

**LAW OF
MORTGAGES OF REAL ESTATE.**

THE LAW
OF
MORTGAGES
OF REAL ESTATE
INCLUDING MORTGAGES
UNDER THE LAND TITLES SYSTEM.

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13

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PREFACE

This book is in part a product of the lectures which I have given at Osgoode Hall since the year 1909, when the Law Society of Upper Canada appointed me lecturer in equity in succession to the late Mr. Alfred H. Marsh, K.C. Some of the features of the book are due to the fact that it is intended for the use of students as well as practitioners.

I have had the advantage of using, in addition to Mr. Marsh's notes, the material contained in the Treatise on the Law of Mortgages of Real Estate, published in 1899, by Mr. Edwin Bell, the present secretary of the Law Society, and the late Mr. Herbert L. Dunn. I have, however, departed so widely from the arrangement adopted by the authors of that work and have to such an extent rewritten and added to their material that it has seemed proper, Mr. Bell being a consenting party, that the present book should appear under my name.

The book contains references to the leading decisions in all the common law provinces. The Ontario statutory provisions relating to the subject have been quoted as a rule without abbreviation, and references have been given to the English statutes, if any, from which they are derived, so as to afford to a practitioner in another province the means of readily comparing the Ontario and English statutes with those of his own province and of judging to what extent the numerous Ontario and English decisions are applicable to his own province. It is hoped therefore that the book will be a useful guide to the law of all the provinces other than Quebec.

The Ontario Registry Act is fully discussed so far as it affects the question of priorities and the law of mortgages,

the registration of deeds being the system which is largely prevalent in Ontario. In the western provinces, on the other hand, the registration of deeds is not the prevalent system and in most of them the registration of titles is the exclusive system. By way of exception, therefore, the discussion of the land titles system has been chiefly based, not on the Ontario statute, but on the statutes of Manitoba, Saskatchewan and Alberta, the provisions of the Ontario statute being referred to for the purpose of comparison.

The German war, now about to be brought to a just conclusion, has had as one of its legal results the enactment of various moratory statutes. Such statutes are in their nature of temporary importance only. They will cease to have any operation within a limited period after the restoration of peace and the decisions construing them will constitute no permanent addition to the law of contract. I have therefore relegated the Mortgagors' and Purchasers' Relief Act to the final chapter, and as it does not appear from practical experience that there is any reason to suppose that mortgagors or their advisers will overlook this statute, I have not considered it necessary, in the earlier parts of the book, to refer to its provisions in qualification of my statement of the remedies of mortgagees.

J. D. F.

Toronto, 31st December, 1918.

Table of Contents

Preface	v
Abbreviations	xx
Table of Cases	xxii
Corrigenda	lxxiv

PART I.

THE CONTRACT OF MORTGAGE.

CHAPTER 1. INTRODUCTORY.

§1. Ancient forms of mortgage	1
§2. Welsh mortgage	4
§3. Sources of modern law of mortgage	5
§4. Definition of mortgage	6
§5. The Conveyancing and Law of Property Act	7
§6. Fraudulent and voluntary conveyances	11

CHAPTER 2. MORTGAGE AT COMMON LAW.

§11. Conveyance of the legal estate	17
§12. Forfeiture on breach of condition	18
§13. Possession of land and title deeds	19
§14. Accretions and fixtures	20
§15. Capacity to make a legal mortgage	24
§16. Capacity of married woman	25
§17. Capacity of trustee or personal representative	27
§18. Consideration	33

CHAPTER 3. LEGAL MORTGAGE IN EQUITY.

§21. Mortgage regarded as security merely	36
§22. Equitable right to redeem and the correlative right to foreclose	37
§23. Mortgage cannot be made irredeemable	41

§24. Once a mortgage always a mortgage	41
§25. Stipulation for a collateral advantage	43
§26. Clogging the equity of redemption	45
§27. Disguised forms of mortgages	51
§28. Nature of the equity of redemption	53
§29. How the equity of redemption may be barred or extinguished	55

CHAPTER 4. LAW AND EQUITY IN UPPER CANADA.

§31. Common law in Upper Canada	57
§32. The law of mortgage	58
§33. Introduction of equitable jurisdiction	61
§34. Subsequent changes in the courts	64
§35. The Judicature Act	66

CHAPTER 5. EQUITABLE MORTGAGES.

§41. Definition of equitable mortgage	71
§42. How an equitable mortgage is created	72
§43. Mortgage of equitable interest	73
(1) Mortgage of an equity of redemption	73
(2) Mortgage of other equitable interest	74
§44. Mortgage by instrument not sufficient to convey the legal estate	75
(1) Defect of form	75
(2) Agreement to give a mortgage	75
(3) Charge on land	76
§45. Mortgage by deposit of title deeds	77
§46. Remedies of equitable mortgagee	80
§47. Floating charge	82

CHAPTER 6. MORTGAGES OF LEASEHOLD.

§51. Law of leasehold mortgages	85
§52. Mortgage by assignment of unexpired term	86
§53. Mortgage by sublease	90
§54. Sublease with declaration of trust	90
§55. Renewal of mortgaged leasehold	91

PART II. PRIORITIES.

CHAPTER 7. EQUITABLE PRINCIPLES GOVERNING PRIORITIES.

§61. The three equitable rules as to priorities	93
§62. Rule 1. Between two equitable mortgages	94
§63. Rule 2. Between first legal mortgage and second equitable mortgage	96
§64. Rule 3. Between first equitable mortgage and second legal mortgage	97
§65. The equitable doctrine of notice	97
§66. Constructive notice	98
§67. Priority of first mortgagee unless he is estopped or the second mortgagee has the legal estate	100
§68. Purchase of legal estate for value without notice..	101
(1) Instrument concealed from mortgagee ...	102
(2) Subsequent receipt of notice	103
(3) Subsequently getting in the legal estate...	103
(4) Better right to call for the legal estate ...	104
(5) Tacking	104

CHAPTER 8. THE REGISTRY ACT.

§71. Registration of instruments in Ontario	106
§72. Effect of not registering	109
§73. Effect of registration as notice	113
§74. Priority of registration	117
§75. Unregistered equitable claims	119
§76. Subsequent advances under prior mortgage	122
§77. Effect of Registry Act on priorities	125
§78. Subrogation of person paying prior mortgage	128
§79. Mechanics liens	130

CHAPTER 9. CONSOLIDATION AND TACKING.

§81. The doctrine of consolidation	136
--	-----

§82. The mortgages must be overdue	138
§83. Effect of the transfer of the equities or of the mortgages	140
§84. Case of different mortgages to one mortgagee	141
§85. Case of mortgages to different mortgagees	142
§86. Consolidation under the Registry Act	145
§87. The doctrine of tacking and the Registry Act	147
§88. So-called tacking to avoid circuity of action	149

CHAPTER 10. THE LAND TITLES ACTS.

§91. Registry Acts and Land Titles Acts	151
§92. Registration of deeds and registration of titles....	154
§93. Mortgages under the land titles system	156
§94. The registered estate and its priority	162
§95. Registration and priorities of mortgages	166
§96. Executions and mechanics liens	169
§97. Unregistered interests, notice and fraud	173
§98. "Legal" and "equitable" mortgages	182
§99. Remedies of the mortgagee	185

PART III.

**PERSONS CLAIMING UNDER THE
MORTGAGEE.**

CHAPTER 11. ASSIGNEE OF THE MORTGAGE.

§101. Transfer of mortgage may include both debt and land	191
§102. Assignment of mortgage debt	194
§103. Notice to, or concurrence of, the mortgagor	196
§104. Assignment subject to state of account	198
§105. Assignment subject to equity or set off	201
§106. Equity to reform or avoid mortgage	205
§107. Liability of assignor to assignee	206
§108. Rights and powers of assignee	208

TABLE OF CONTENTS.

xi

CHAPTER 12. EXECUTION CREDITORS OF THE MORTGAGEE.

§111. Rights of execution creditors	211
§112. Seizure of mortgage under execution	211
§113. Discharge by sheriff or bailiff	214

CHAPTER 13. PERSONS ENTITLED ON DEATH OF THE MORTGAGEE.

§121. Mortgage security is personalty	216
§122. Legal estate formerly devolved as realty	217
§123. The Devolution of Estates Act	219
§124. Discharge in case of death of mortgagee	222
§125. Transmission under the Land Titles Acts	225

PART IV.

PERSONS CLAIMING UNDER THE MORTGAGOR.

CHAPTER 14. TRANSFEREE OF THE EQUITY OF REDEMPTION.

§131. Mortgage of the equity of redemption	229
§132. Absolute transfer of the equity of redemption ...	230
§133. Personal liability of mortgagor to mortgagee ...	233
§134. Obligation of transferee to indemnify transferor..	234
§135. Mortgagee entitled to enforce indemnity only if it is assigned to him	239
§136. Mortgagee may disable himself from enforcing indemnity	241
§137. Marshalling and subrogation	243
§138. Case of transfer of one of two parcels subject to a common mortgage	245
§139. Case of transfer to different persons of two p cel's subject to a common mortgage	246

CHAPTER 15. LESSEE OF MORTGAGED LAND.	
§141. Distinction between leases before and after mortgage	249
§142. Lease by owner prior to mortgage	250
§143. Lease by mortgagor subsequent to mortgage	254
§144. Statutory or contractual power to lease	257
CHAPTER 16. EXECUTION CREDITORS OF THE MORTGAGOR.	
§151. Rights of execution creditors	259
§152. Seizure and sale of equity of redemption	261
§153. Effect of seizure, sale and conveyance by sheriff ..	263
§154. Who may purchase at sheriff's sale	264
CHAPTER 17. PERSONS ENTITLED ON DEATH OF THE MORTGAGOR.	
§161. Devolution of equity of redemption	266
§162. The Devolution of Estates Act	268
§163. Locke King's Act	271
§164. Estates of insolvent deceased persons	273
CHAPTER 18. DOWER AND CURTESY IN MORTGAGED LAND.	
§171. Dower in legal estate	277
§172. Dower in equity of redemption, 1834-1879	281
§173. Dower in equity of redemption since 11th March, 1879	282
§174. Quantum of dower in equity of redemption	286
§175. Bar and forfeiture of dower	291
§176. Tenancy by the curtesy	297

PART V. EXTINGUISHMENT OF MORTGAGE.

CHAPTER 19. DISCHARGE OR RECONVEYANCE.

§181. Revesting of estate on payment of mortgage	299
§182. Obligation of mortgagee to reconvey	301
§183. Statutory form of discharge	303
§184. Effect of discharge when registered	308
§185. Discharge in case of death of mortgagee	314
§186. Vesting order	317
§187. Discharge under the Land Titles Acts	321

CHAPTER 20. RIGHT TO ASSIGNMENT OF MORTGAGE.

§191. Reconveyance to the person best entitled	324
§192. Statutory right to assignment of mortgage instead of reconveyance	326
§193. The amending statute	329
§194. Priorities unaffected by the statute	330
§195. Assignment on the same terms as reconveyance ..	335
§196. Statute not applicable to mortgagee in possession ..	336

CHAPTER 21. MERGER.

§201. Merger at law and in equity	338
§202. Intention expressly declared	341
§203. Intention gathered from circumstances of transac- tion	342
§204. Intention presumed from consideration of benefit	343
§205. Purchase with notice of subsequent charge ...	346

PART VI. MORTGAGE ACTIONS.

CHAPTER 22. ACTION FOR POSSESSION.

§211. Concurrent remedies of the mortgagee	349
§212. Possession as between mortgagor and mortgagee ..	350

§213. Mortgagee's right in absence of redemise	353
§214. Proviso for quiet enjoyment until default	355
§215. Rights of mortgagor in possession	358
§216. Rights of mortgagee against third parties	369
§217. Possession under the Land Titles Acts	360

CHAPTER 23. ACTION ON THE COVENANT.

§221. Personal remedy of the mortgagee	366
§222. Covenant for payment	369
§223. Who may sue on the covenant	372
§224. Who may be sued on the covenant	373
§225. When the right to sue arises	375
§226. Acceleration of payment	377
§227. When mortgagee is disentitled to sue	383

CHAPTER 24. ACTION FOR FORECLOSURE OR SALE.

§231. The right to foreclosure or sale	388
§232. Writ of summons for foreclosure	395
§233. Plaintiffs in the action	399
§234. Original defendants	401
(a) The mortgagor.	
(b) The owner of the equity of redemption.	
(c) The lessee of the mortgagor.	
(d) Personal representatives.	
(e) The wife or husband of the mortgagor	
(f) A surety for the mortgagor.	
§235. Pleadings	415
§236. Interlocutory judgment	418
§237. General conduct of the reference	425
§238. Considering judgment and adding parties	426
§239. Taking accounts and appointing day for redemption	432
§240. The master's report	439
§241. Subsequent accounts and appointment of new day for redemption	442

TABLE OF CONTENTS.

xv

§242. Stay of action on payment of arrears	446
§243. Change of state of the account	447
§244. Final order of foreclosure	448
§245. Action or judgment for sale	455
§246. Foreclosure or sale under the Land Titles Acts...	466
§247. Sale proceedings in the registrar's office	474
§248. Foreclosure in the registrar's office	480

CHAPTER 25. ACTION FOR REDEMPTION.

§251. The right to redeem	486
§252. When the right arises	490
§253. Notice or interest after default	493
§254. Tender	496
§255. Payment	500
§256. Who may be plaintiffs	503
§257. Who must be defendants	506
§258. Writ and interlocutory judgment	509
§259. Proceedings in the master's office	511

CHAPTER 26. LIMITATION OF ACTIONS.

A. *Personal Actions for Payment.*

§261. Covenant, debt and account	515
§262. Disability or absence	517
§263. Acknowledgment or part payment	518

B. *Actions to recover Money out of Land.*

§264. Limitation as to principal	522
§265. Acknowledgment or part payment	525
§266. Limitation as to arrears of interest	527
§267. Acknowledgment	531

C. *Actions for Possession, Foreclosure or Sale.*

§268. Limitation prior to 1833	532
§269. The Real Property Limitation Acts	534
§270. Action to recover land	535
§271. When the right is deemed to accrue	539

§272. Acknowledgment	545
§273. Part payment	548
§274. Effect of bringing action	550
§275. Disabilities in case of action to recover land	553
§276. Extinguishment of right and title	555

D. Actions for Redemption.

§277. Limitation if mortgagee in possession	557
§278. Time not extended by reason of disability	559
§279. Nature of possession of mortgagee	561
§280. Possession of part of mortgaged land	564
§281. Acknowledgment of title by mortgagee	565

E. The Land Titles Act.

§282. Possession adverse to registered title	568
--	-----

PART VII. MORTGAGE ACCOUNTS.

CHAPTER 27. ACCOUNTING BETWEEN MORTGAGOR AND MORTGAGEE.

§291. Right of mortgagor to an account	573
§292. Taking of mortgage account	574
§293. Items included in the account	575
§294. Accounting by mortgagor in possession	577
§295. Waste by mortgagor in possession	577

CHAPTER 28. MORTGAGEE IN POSSESSION.

§301. When mortgagee is deemed to be in possession...	580
§302. Rights of mortgagee in possession	582
§303. Right to reimbursement for expenses incurred ...	584
§304. Obligations of mortgagee in possession	588
§305. Liability for occupation rent	589
§306. Liability for rents and profits	591
§307. Liability for waste or deterioration	594
§308. Manner of taking accounts	595

TABLE OF CONTENTS.

xvii

CHAPTER 29. INTEREST.

§311. When interest is payable	599
§312. Rate of interest until maturity	600
§313. Rate of interest after maturity	602
§314. Increased rate after default	606
§315. Calculation and apportionment of interest	608
§316. Compound interest	611
§317. Interest in lieu of notice	612
§318. Legislative jurisdiction as to interest and mortgages	613

CHAPTER 30 COSTS.

§321. General principles	617
§322. Costs of negotiating and completing loan	618
§323. Costs incurred to protect the security	619
§324. Costs of mortgage action	622
§325. Taxation of costs	628

PART VIII.

STATUTORY AND CONTRACTUAL RIGHTS.

CHAPTER 31. SALE UNDER POWER OF SALE.

§331. Origin of the power of sale	631
§332. Statutory implied power of sale	633
§333. Contractual power of sale	638
§334. Statutory short form of power of sale	640
§335. Qualifications of the short form	642
§336. Who may exercise the power	646
§337. When the power may be exercised	649
§338. Power of sale without notice	653
§339. Form and service of notice	654
§340. Concurrent proceedings by the mortgagee	662
§341. Conduct of the sale	665
§342. Who may purchase	673

§343. The conveyance and its effect	676
§344. Application of the proceeds	680
§345. Sale under the Land Titles Acts	683

CHAPTER 32. APPOINTMENT OF RECEIVER.

§351. Receiver for equitable mortgagee	686
§352. Appointment under the Judicature Act	688
§353. Mortgagee's statutory or express power to appoint	690
§354. Liability for acts or defaults of receiver	692
§355. Powers and liability of receiver	692

CHAPTER 33. ATTORNMENT AND DISTRESS.

§361. Express power to distrain	694
§362. Tenancy created by attornment	696
§363. Distress in case of attornment	700
§364. On what goods the mortgagee may distrain	705
§365. What arrears may be recovered by distress	709
§366. Attornment under the Land Titles Acts	710

CHAPTER 34. FIRE INSURANCE.

§371. Insurable interest	712
§372. Right or obligation to insure	714
§373. Insurance in the name of the mortgagor	716
§374. Mortgage clause in insurance policy	721
§375. Insurance in the name of the mortgagee	724
§376. Application of insurance money	726

CHAPTER 35. THE SHORT FORMS OF MORTGAGES ACT.

§381. Short forms provided by statute	731
§382. Schedule A.	732
§383. Schedule B.	733
§384. Implied covenants	738

TABLE OF CONTENTS.

xix

CHAPTER 36. THE MORTGAGORS AND PURCHASERS
RELIEF ACT.

§391. Proceedings not to be taken without leave	742
§392. Excepted cases	744
§393. Powers of the judge	746
§394. Retroactive operation	748
§395. Power to make rules	749
§396. Lands situate or mortgage made without Ontario	749
§397. Duration of the statute	749
INDEX	751

Abbreviations

[The following list refers in most instances to Canadian reports, the usual abbreviations of the English reports being omitted. The reports cited below as U.C.C.P., O.A.R., O.P.R., are usually cited in the province of Ontario simply as C.P., A.R., P.R., respectively, but this local method of citation seems too brief for use outside the province.]

A.L.R.	Alberta Law Reports.
B.C.R.	British Columbia Reports.
C.L.J.	Canada Law Journal.
C.L.T.	Canadian Law Times.
Can. S.C.R.	Supreme Court of Canada Reports.
D.L.R.	Dominion Law Reports.
Draper	Draper's Upper Canada Queen Bench Reports.
Gr.	Grant's Upper Canada Chancery Reports.
L.Q.R.	Law Quarterly Review.
M.R.	Manitoba Reports.
N.B. Eq. Cas.	New Brunswick Equity Cases.
N.B.R.	New Brunswick Reports.
N.S.R.	Nova Scotia Reports.
N.W.T.L.R.	Territories Law Reports.
O.A.R.	Ontario Appeal Reports.
O.L.R.	Ontario Law Reports (since 1900)
O.P.R.	Ontario Practice Reports.
O.R.	Ontario Reports.
O.W.N.	Ontario Weekly Notes.
O.W.R.	Ontario Weekly Reporter.
Q.L.J.	Queensland Law Journal.
R.C.	Ruling Cases (English).
S.L.R.	Saskatchewan Law Reports.

ABBREVIATIONS.

xxi

U.C. Chy. Ch.	Upper Canada Chancery Chambers Reports.
U.C.C.P.	Upper Canada Common Pleas Reports.
U.C.E. & A.	Upper Canada Error and Appeal Reports.
U.C.O.S.	Upper Canada Reports, Old Series.
U.C.R.	Upper Canada Reports (Queen's Bench).
V.L.R.	Victorian Law Reports.
W. & T.L.C. Eq.	White and Tudor, Leading Cases in Equity, 8th edition.
W.L.R.	Western Law Reporter.
W.W.R.	Western Weekly Reporter.

Table of Cases

Abbott and Medcalf, Re, 1891, 20 O.R. 299	260, 658
Abbott v. Stratten, 1846, 3 Jo. & Lat. 603	76
Abell v. Heathcote, 1793, 4 Bro. C.C. 277	670
Abell v. Morrison, 1890, 19 O.R. 669	129
Acadian Loan Co. v. Legere, 1911, 45 N.S.R. 328	366
Acme Co. v. Huxley, 1912, 4 A.L.R. 63	79
Adams v. Angell, 1877, 5 Ch.D. 634	343, 345, 346, 347
Adams v. Claxton, 1801, 6 Ves. 226	150
Adams and McFarland, Re, 1914, 20 D.L.R. 293	156
Adanac Oil Co. v. Stocks, 1916, 11 A.L.R. 214, 28 D.L.R. 215....	172
Agra Bank v. Barry, 1874, L.R. 7 H.L. 135, 21 R.C. 784	128
Agricultural Savings and Loan Co. v. Liverpool and London and Globe Insurance Co., 1901, 3 O.L.R. 127, reversed <i>sub nom.</i> Liverpool, etc. v. Agricultural, etc., Co., 1903, 33 Can. S.C.R. 94	718, 723
Agricultural Savings and Loan Co. v. Webb, 1907, 15 O.L.R. 213.	206
Aikins v. Blain, 1867., 13 Gr. 646.....	74, 687, 688
Ainsworth v. Wilding, [1905] 1 Ch. 435	598
Airey v. Mitchell, 1874, 21 Gr. 510	515, 529
Alarie and Frechette, Re, 1913, 23 M.R. 628, 14 D.L.R. 298.....	469
Alderson v. Elgey, 1884, 26 Ch.D. 567	325
Alderson v. White, 1858, 2 De.G. & J. 97	52
Aldrich v. Canada Permanent Loan and Savings Co., 1897, 24 O.A.R. 193, 27 O.R. 548	668, 670
Aldrich v. Cooper, Durham v. Lankester, Durham v. Armstrong, 1802, 18 Ves. 382, 18 R.C. 198, 1 W. & T.L.C. Eq. 35	244
Alexander v. Gesman, 1911, 4 S.L.R. 111, affirmed <i>sub nom.</i> Mc- Killop & Benjafield v. Alexander, 1912, 45 Can. S.C.R. 551, 1 D.L.R. 586	185
Alison, In re, Johnson v. Mounsey, 1879, 11 Ch.D. 284	51, 390, 517, 563, 566, 582, 665
Allan v. McTavish. 1878, 2 O.A.R. 278	515, 523
Allan v. Rever, 1902, 4 O.L.R. 309	277
Allen v. Hill, 1591, Cro. Eliz. 238, 25 R.C. 1	353
Allen v. Lloyd, in re Lloyd, 1879, 12 Ch.D. 447	689
Allen v. Longstaffe, Garfitt v. Allen, 1887, 37 Ch.D. 48	351
Allenby v. Dalton, 1835, 5 L.J.K.B. 312	52
Alliance Bank v. Broom, 1862, 2 Dr. & Sm. 289	80
Allison v. Frisby, In re Frisby, 1889, 43 Ch.D. 106 ..522, 523, 527, 549	
American Abell Engine and Thresher Co. and Noble, In re, 1906, 6 N.W.T.L.R. 359	168
Ames v. Mannering, 1859, 26 Beav. 583	527
Ancaster (Duke of) v. Mayer, 1785, 1 Bro. C.C. 453, 1 W. & T.L.C. Eq. 1, 18 R.C. 176	269, 270, 271, 367
Anderson v. Elgie, 1903, 6 O.L.R. 147	282
Anderson v. Hanna, 1889, 19 O.R. 58.....	646

TABLE OF CASES.

xxlii

Anderson v. Henry, 1898, 29 O.R. 719	704
Anderson v. Stevenson, 1888, 15 O.R. 563	658
Anderton, Re, 1908 8 W.L.R. 319	570
Angel v. Smith, 1804, 9 Ves. 335	688
Annable v. Coventry, 1912, 46 Can. S.C.R. 573, 5 D.L.R. 661, affirming Coventry v. Annable, 1911, 4 S.L.R. 175, 425 ..	177, 180, 181
Anon., 1707, 1 Salk. 155	201
Anon., 1746, 3 Atk. 313	534
Anon., 1821, 6 Madd. & G. 10	638
Ansell v. Bradley, 1916, 37 O.L.R. 142, 31 D.L.R. 297	655
Appelbe v. Windsor Security Co., 1917, 41 O.L.R. 217, 40 D.L.R. 256, S.C. 1918, 42 O.L.R. 16	744
Archbold v. Building and Loan Association, 1888, 16 O.A.R. 1, reversing 15 O.R. 237....	493, 494, 496, 604
Archer v. Severn, 1886, 14 O.A.R. 723, 12 O.R. 615	225
Archibald v. Lawlor, 1902, 35 N.S.R. 48	553
Ardagh v. Wilson, 1867, 1 Chy. Ch. (U.C.) 389 ..	438
Argles v. McMath, 1896, 23 O.A.R. 44	22
Armstrong v. Lye, 1897, 24 O.A.R. 543, 27 O.R. 511	114
Armstrong v. Lye, 1900, 27 O.A.R. 287	344
Arnold v. National Trust Co., 1912, 5 A.L.R. 214, 7 D.L.R. 754..	45
Ashenhurst v. James, 1746, 3 Atk. 270	201
Ashton v. Corrigan, 1871, L.R. 13 Eq. 76	633
Ashton v. Dalton, 1846, 2 Coll. 565, 18 R.C. 40	79
Ashworth v. Lord, 1887, 36 Ch.D. 545	582, 596, 597
Assets Co. v. Mere Roihi, [1905] A.C. 177	156, 175, 176, 180, 182
Astbury v. Astbury, [1898] 2 Ch. 111	532
Astley v. Milles, 1827, 1 Sim 298	343
Attorney-General of Ontario v. Mercer, 1883, 8 App. Cas. 767, reversing 5 Can. S.C.R. 538	219
Attorney-General v. Odell [1906] 2 Ch. 47	155
Atkinson and Horsell's Contract, In re, [1912] 2 Ch. 1	556
Auger, Re, 1912, 26 O.L.R. 402, 5 D.L.R. 680	286, 289
Austin v. Story, 1863, 10 Gr. 306	729
Auston v. Boulton, 1866, 16 U.C.C.P. 318	193
Ayerst v. McClean, 1890, 14 O.P.R. 15	413
Backhouse v. Charlton, 1878, 8 Ch.D. 444	389
Bacon v. Rice Lewis & Son, 1897, 33 C.L.J., 680	23
Bagnall v. Villar, 1879, 12 Ch.D. 812	584
Bailey, In re, Bailey v. Bailey, 1879, 12 Ch.D. 268	32
Bailey v. Barnes, [1894] 1 Ch. 25, 18 R.C. 510	94, 99, 104, 678
Bailey v. Richardson, 1852, 9 Hare 734	341
Bain v. Brand, 1876, 1 App. Cas. 762	22
Bain v. Pitfield, 1916, 26 M.R. 89, 28 D.L.R. 206	171
Baker, In re, Ex parte Bisdée, 1840, 1 Mont. D. & De G. 333, 18 R.C. 137	20

Baker v. Welton, 1845, 14 Sim. 426	566
Bald v. Thompson, 1869, 16 Gr. 177	394
Balfe v. Lord, 1842, 2 Dr. & War. 480, 18 R.C. 481	4, 5, 388
Ball v. Lord Riversdale, 1816, Beatty 550	567
Bank of Africa v. Cohen, [1909] 2 Ch. 129	391
Bank of Montreal v. Condon, 1896, 11 M.R. 366	171
Bank of Montreal v. Stuart, [1911] A.C. 120	27
Bank of New South Wales v. O'Connor, 1889, 14 App. Cas. 273..	494, 497, 622, 623
Bank of Toronto v. Irwin, 1881, 28 Gr. 397	454
Bank of Upper Canada v. Brough, 1862, 2 U.C.E. & A. 96	259
Bank of Upper Canada v. Scott, 1858, 6 Gr. 451	392
Banks v. Whittall, 1847, 1 DeG. & Sm. 536	77
Banner v. Berridge, 1881, 18 Ch.D. 254	494, 517
Barber v. McCuaig, 1897, 24 O.A.R. 492, reversed <i>sub nom.</i> Mc-	
Cuaig v. Barber, 1898, 29 Can. S.C.R. 126.....	242
Barber v. McCuaig (no. 2), 1900, 31 O.R. 593.....	242
Barber v. McKay, 1890, 19 O.R. 46	112
Barclay, Ex parte, In re Joyce, 1874, L.R. 9 Ch. 576.....	669
Barker v. Illingworth, [1908] 2 Ch. 20	650
Barnes v. Glenton, [1899] 1 Q.B. 885	516, 523
Barnes v. Racster, 1842, 1 Y. & C.C.C. 401	619
Barnett v. Guildford (Earl), 1855, 11 Ex. 19	256
Barnhart v. Greenshields, 1853, 9 Moo. P.C. 18, 5 Gr. 99	53
Barron v. Martin, 1815, 19 Ves. 327.....	534
Barrow v. Isaacs & Son, [1891] 1 Q.B. 417	18
Barry v. Anderson, 1891, 18 O.A.R. 247	644, 653
Bartlett v. Jull, 1880, 28 Gr. 140	654, 656, 680
Bartlett v. Rees, 1871, L.R. 12 Eq. 395	392, 437
Barton v. Bank of New South Wales, 1880, 15 App. Cas. 379	51
Barton v. McMillan, 1892, 20 Can. S.C.R. 404	52
Bashford v. Cann, 1863, 33 Beav. 109	50
Baskerville v. Otterson, 1873, 20 Gr. 379	197
Bassett v. Nosworthy, 1673, Rept. Finch 102, 2 W. & T.L.C. Eq.	
163, 21 R.C. 702	100
Batchelor v. Yates, In re Yates, 1888, 38 Ch.D. 112	669
Batchelor v. Middleton, 1848, 6 Hare 75	566
Bateman v. Hunt, [1904] 2 K.B. 530	199, 200
Bates v. Hillcoat, 1852, 16 Beav. 139	438
Batten, Proffitt & Scott v. Dartmouth Harbour Commissioners,	
1890, 45 Ch.D. 612	627
Battison v. Hobson, [1896] 2 Ch. 403	176
Baynard v. Woolley, 1855, 20 Beav. 583	76
Beachey, In re, Heaton v. Beachey, [1904] 1 Ch. 67	86, 194
Beale v. Symonds, 1853, 16 Beav. 406	267
Beam v. Beatty, 1902, 4 O.L.R. 554	25
Beaton v. Wilbur, 1906, 3 N.B. Eq. 309	51

TABLE OF CASES.

xxv

Beatty v. Bailey, 1912, 26 O.L.R. 145, 3 D.L.R. 831	384, 516
Beatty v. Fitzsimmons, 1893, 23 O.R. 345	235, 236
Beaty v. Gregory, 1897, 24 O.A.R. 325	370
Beatty v. O'Connor, 1884, 5 O.R. 747	574, 625, 672, 682
Beaty v. Shaw, 1886, 13 O.R. 21, 14 O.A.R. 600	316
Beavan, In re, Ex parte Coombe, 1819, 4 Madd. 249, 20 R.R. 294..	78
Becher v. Webb, 1879, 7 O.P.R. 445	433
Beckes v. Tiernan, Re Molphy, 1896, 17 O.P.R. 247	440
Beckett v. Buckley, 1874, L.R. 17 Eq. 435	505
Beckford v. Kemble, 1822, 1 Sim. & St. 7	489
Beddoe, In re, Downes v. Cottam, [1893] 1 Ch. 547	620, 623
Beckman v. Jarvis, 1847, 3 U.C.R. 280	124
Beetham, In re, Ex parte Broderick, 1887, 18 Q.B.D. 380	78
Bevor v. Luck, 1867, L.R. 4 Eq. 537	438, 504
Bélanger v. Bélanger, 1911, 24 O.L.R. 439	29
Bell, In re, Lake v. Bell, 1886, 34 Ch.D. 462	517
Bell v. Antwerp, London and Brazil Line, [1891] 1 Q.B. 103	377
Bell v. Carter, 1853, 17 Beav. 11	52
Bell v. Walker, 1873, 20 Gr. 558	231
Bellamy v. Badgerow, 1893, 24 O.R. 278	295
Bellamy v. Brickenden, 1861, 2 John & H. 137	575
Benjamin Cope & Sons, In re, Marshall v. Benjamin Cope & Sons, [1914] 1 Ch. 800	84
Bennett v. Aburrow, 1803, 8 Ves. 609	677
Bennett v. Foreman, 1868, 15 Gr. 117	393
Bennett v. Harfoot, 1871, 19 W.R. 428	421
Bent v. Young, 1838, 9 Sim. 180	489
Bernard v. Faulkner, 1915, 1 O.L.R. 439, 18 D.L.R. 174	239, 485
Berney v. Sewell, 1820, 1 J. & W. 647	591, 688
Berwick & Co. v. Price, [1905] 1 Ch. 632	97, 100
Beswetherick v. Griesman, 1915, 8 O.W.N. 439	747
Beswetherick and Greisman, Re, 1915, 8 O.W.N. 566	747
Bethune v. Calcutt, 1853, 3 Gr. 648	443
Bettes v. Farewell, 1865, 15 U.C.C.P. 450	611
Betts, In re, Ex parte Harrison, 1881, 18 Ch.D. 127	700, 702
Bickerton v. Walker, 1885, 31 Ch.D. 151	199, 506
Bickford v. Grand Junction Ry. Co., 1877, 1 Can. S.C.R. 696 ..	417, 425
Bidder v. Bridges, 1887, 37 Ch.D. 406	502
Bigelow v. Staley, 1864, 14 U.C.C.P. 276	311
Biggs v. Freehold Loan and Savings Co., 1901, 31 Can. S.C.R. 136, reversing 26 O.A.R. 232	517, 603
Biggs v. Hoddinott, [1898] 2 Ch. 307	44, 490
Bills v. Tatham, In re Patrick, [1891] 1 Ch. 82	192
Birch v. Wright, 1786, 1 T.R. 378, 15 R.C. 626	364
Bird v. Wenn, 1886, 33 Ch.D. 215	146, 624
Birmingham v. Harwood, 1825, Turn. & R. 477	597

Bisdee, <i>Ex parte</i> , <i>In re Baker</i> , 1840, 1 Mont. D. & DeG. 333, 18 R.C. 137	20
Bishop v. Church, 1751, 2 Ves. Sen. 370	497
Biss, <i>In re</i> , <i>Biss v. Biss</i> , [1903] 2 Ch. 40	92, 676
Black v. Hiebert, 1907, 38 Can. S.C.R. 557	575
Blackburn v. Parbola, <i>In re Parbola</i> [1909] 2 Ch. 437	429
Blackwood v. London Chartered Bank of Australia, 1874, L.R. 5 P.C. 92	105
Blake v. Beaty, 1855, 5 Gr. 359	333, 339
Blake v. Gale, 1886, 32 Ch.D. 571	487
Bland and Mohun, <i>Re</i> , 1913, 30 O.L.R. 100, 16 D.L.R. 716	196, 313
Blong v. Fitzgerald, 1893, 15 O.P.R. 467	413
Bloomfield v. Hellyer, 1895, 22 O.A.R. 232	584
Boye's Trust, 1849, 1 Mac. & G. 488	673
Blumberg v. Life Interests, etc., Corporation, [1895] 1 Ch. 171, [1898] 1 Ch. 27	500
Blunt v. Marsh, 1888, 1 N.W.T.L.R. 126	53
Boardman v. Handley, 1899, 4 N.W.T.L.R. 266	51
Bolding v. Lane, 1863, 1 DeG. J. & S. 122	532
Bolton v. Buckenham, [1891] 1 Q.B. 278	376
Bolton v. Salmon, [1891] 2 Ch. 48	505
Bompas v. King, 1886, 33 Ch.D. 279	583, 587
Bondy v. Fox, 1869, 29 U.C.R. 64	110
Bonham v. Newcomb, 1684, 1 Vern. 232	389
Bonney v. Ridgard, 1784, 1 Cox's Cas. in Ch. 145	534
Booth v. Booth, 1742, 2 Atk. 343	349
Boston v. LeHèvre, 1870, L.R. 3 P.C. 157	223
Boulton v. Gzowski, 1898, 39 Can. S.C.R. 54, 24 O.A.R. 502, 28 O.R. 285	234
Boulter-Waugh v. Phillips, 1918, 42 D.L.R. 548	177
Boulton v. Rowland, 1883, 4 O.R. 720	625
Bourton v. Williams, 1870, L.R. 5 Ch. 665	502
Bousfield v. Hodges, 1863, 33 Beav. 90	668
Bovey v. Skipwith, 1671, 1 Cas. in Ch. 201	137, 147
Bovill v. Endle, [1896] 1 Ch. 648	352, 490, 494
Bowes, <i>In re</i> , <i>Ex parte Jackson</i> , 1880, 14 Ch.D. 725	697, 700, 701
Bowyer v. Woodman, 1867, L.R. 3 Eq. 313	528
Box v. Bridgman, 1875, 6 O.P.R. 234	675
Boyd v. Johnson, 1890, 19 O.R. 598	234
Boyd v. Petric, 1872, L.R. 7 Ch. 385, 14 R.C. 760	651
Boyne v. Robinson, 1904, 3 N.B. Eq. 57	682
Brace v. Duchess of Marlborough, 1728, 2 P. Wms. 491	105
Bradburn v. Edinburgh Life Assurance Co., 1903, 5 O.L.R. 657, 192, 614, 615	
Bradford Banking Co. v. Briggs, 1886, 12 App. Cas. 29	122
Bradley's Estate, <i>In re</i> , 1903, 6 O.L.R. 397	30
Bradley v. Borlase, 1858, 7 W.R. 125	627

TABLE OF CASES.

xxvii

Bradley v. Carritt, [1903] A.C. 253	47, 48, 490
Bradshaw v. Patterson, 1911, 4 S.L.R. 208	570
Bradshaw v. Widdrington, [1902] 2 Ch. 430	526
Brandt's Sons & Co. v. Dunlop Rubber Co., [1905] A.C. 454	197
Briethaupt v. Marr, 1893, 20 O.A.R. 689	124
Brennan v. Finley, 1905, 9 O.L.R. 131	550
Brethour v. Brooke, 1893, 23 O.R. 658, 21 O.A.R. 144....	258, 357, 595
Bridges v. Real Estate Loan and Debenture Co., 1885, 8 O.R. 493	
	203, 205
Briggs v. Calverley, 1800, 8 T.R. 629	498
Briggs v. Jones, 1870, L.R. 10 Eq. 92	95
Bright v. Campbell, 1889, 41 Ch.D. 388	606
Bright v. McMurray, 1882, 1 O.R. 172	563
Bristol & West of England Land Co. v. Taylor, 1893, 24 O.R. 286..	207
British Canadian Loan and Agency Co. v. Farmer, 1904, 15 M.R.	
593	530, 538, 602
British Canadian Loan and Investment Co. and Ray, Re, 1888, 16	
O.R. 15	653
British Canadian Loan Co. v. Tear, 1893, 23 O.R. 664	235, 240
British and Canadian Loan and Investment Co. v. Williams,	
1888, 15 O.R. 366	56, 339, 384
British Columbia Land and Investment Agency v. Ishitaka, 1911,	
45 Can. S.C.R. 302	666
British Columbia Tie and Timber Co., Re, 1908, 14 B.C.R. 81....	663
British South Africa Co. v. Companhia de Mocambique, [1893]	
A.C. 602	391
British South Africa Co. v. DeBeers Consolidated Mines, [1910]	
2 Ch. 502, [1912] A.C. 52	75
British Union and National Insurance Co. v. Rawson, [1916] 2	
Ch. 476	240
Broek v. Forster, 1897, 34 N.B.R. 262	257
Broeklesby v. Temperance, etc., Building Society, [1895] A.C.	
173	96, 192
Broderick, Ex parte, In re Beetham, 1887, 18 Q.B.D. 380	78
Brooks v. Marston, In re Fox, [1913] 2 Ch. 75	557
Brooks v. Muckleston, [1909] 2 Ch. 519	394
Brotherton v. Hetherington, 1876, 23 Gr. 187	586
Brower v. Canada Permanent Building Association, 1877, 24 Gr.	
509	146
Brown, Ex parte, In re Reed, 1878, 9 Ch.D. 389	669
Brown's Estate, In re, Brown v. Brown [1893] 2 Ch. 300....	376, 543
Brown v. Barkham, 1720, 1 P. Wms. 652	608
Brown v. Broughton, 1915, 25 M.R. 489, 24 D.L.R. 244.....	156, 180
Brown v. Brown, 1904, 8 O.L.R. 332	283
Brown v. Cole, 1845, 14 Sim. 427, 18 R.C. 116	490, 557, 558
Brown v. Deacon, 1866, 12 Gr. 198	608
Brown v. Freeman, 1851, DeG. & S. 444	50

Brown v. Grady, 1899, 31 O.R. 73	375
Brown v. McLean, 1889, 18 O.R. 533	129, 313
Brown v. Metropolitan Counties Life Insurance Society, 1859, 1 El. & El. 832, 9 R.C. 610	252, 696
Brown v. Peto, [1900] 2 Q.B. 653	257
Browne v. Lockhart, 1840, 10 Sim. 420	493
Browne v. Ryan, [1901] 2 I.R. 653	46
Brownlee v. Cunningham, 1867, 13 Gr. 586	434
Bruse & Garden, 1869, L.R. 5 Ch. 32	50
Brush v. Aetna Insurance Co., 1864, 1 Old (N.S.) 459	719
Bryson v. Huntington, 1877, 25 Gr. 265	623
Buchanan v. Harvie (No. 2), 3 N.B. Eq. 61	45
Buckley v. Wilson, 1861, 8 Gr. 566	334, 402, 407, 657
Bucknam v. Stewart, 1897, 11 M.R. 625	538
Building and Loan Association v. McKenzie, 1897, 28 Can. S.C.R. 407, 24 O.A.R. 599, 28 O.R. 316	91
Building and Loan Association v. Poaps, 1896, 27 O.R. 470	121, 418
Bull v. North British Canadian Investment Co., 1889, 18 Can. S.C.R. 697, Cameron, S.C. Cas. 1, affirming 15 O.A.R. 421	722
Bullen v. Renwick, 1862, 9 Gr. 202	52, 587
Bunnell v. Gordon, 1890, 20 O.R. 281	283
Burke v. O'Connor, 1853, 4 Ir. Ch. 418	620
Burn v. Burn, 1797, 3 Ves. 573	76
Burnett v. Guldford (Earl), 1855, 11 Ex. 19	360
Burns v. Davidson, 1892, 21 O.R. 547	489
Burrell, In re, Burrell v. Smith, 1869, L.R. 7 Eq. 399	384, 407
Burrell v. Earl of Egremont, 1843, 7 Beav. 205, 18 R.C. 540	346, 526
Burrowes v. Molloy, 1845, 2 Jo. & Lat. 521	390, 393
Burrows v. Ellison, 1871, L.R. 6 Ex. 128	554
Burt, Boulton & Hayward v. Bull, [1895] 1 Q.B. 276, 18 R.C. 462	584, 693
Burton v. Dougall, 1899, 30 O.R. 543	676
Bute (Marquis of) v. Cunynghame, 1826, 2 Russ. 275	243
Butler v. McMicken, 1900, 32 O.R. 422	524
Butler v. Rice, [1910] 2 Ch. 277	340
Cahuae v. Durie, 1869, 2 Chy. Ch. (Ont.) 394	451
Caddwell v. Stadacona Fire and Life Insurance Co., 1883, 11 Can. S.C.R. 212	717
Callischer v. Bischoffsheim, 1870, L.R. 5 Q.B. 449	35
Calvert v. Burnham, 1881, 6 O.A.R. 620	619
Cameron v. Cameron, 1869, 2 Chy. Ch. (Ont.) 375	451
Cameron v. Gibson, 1889, 17 O.R. 233	584
Cameron v. Kerr, 1878, 3 O.A.R. 30	503
Cameron v. McIlroy, 1884, 1 M.R. 242	621
Cameron v. McRae, Sparks v. Redhead, 1812, 3 Gr. 311	389
Cameron v. Walker, 1890, 19 O.R. 212	550

TABLE OF CASES.

xxix

Cameron v. Wolfe Island Co., 1873, 6 O.P.R. 91	433
Campbell, In re, Campbell v. Campbell, [1893] 2 Ch. 206	273
Campbell v. Canadian Co-operative Investment Co., 1906, 16 M.R. 464	716
Campbell v. Douglas, 1916, 54 Can. S.C.R. 28, 32 D.L.R. 734, af- firming 34 O.L.R. 580, 25 D.L.R. 436	235
Campbell v. Holyland, 1877, 7 Ch.D. 166	452, 453
Campbell v. Imperial Loan Co., 1905, 15 M.R. 614	507
Campbell v. Imperial Loan Co., 1908, 18 M.R. 144	564, 679
Campbell v. McDougall, 1880, 5 O.A.R. 503, affirmed <i>sub nom.</i> McDougall v. Campbell, 1881, 6 Can. S.C.R. 502	459
Campbell v. Morrison, 1897, 24 O.A.R. 224, affirmed <i>sub nom.</i> Maloney v. Campbell, 28 Can. S.C.R. 228	236, 240
Canada Landed and National Investment Co. v. Shaver, 1895, 22 O.A.R. 377	233, 240
Canada Life Assurance Co. v. Vance, 1909, 2 S.L.R. 398	468
Canada Permanent Building and Savings Society v. Rowell, 1860, 19 U.C.R. 124	250
Canada Permanent Building Society v. Teeter, 1889, 19 O.R. 156 653, 665	
Canada Permanent Loan and Savings Co. v. Macdonnell, 1875, 22 Gr. 461	504
Canada Permanent Mortgage Corporation v. Jesse, 1909, 2 S.L.R. 251	465
Canada Permanent Mortgage Corporation v. Martin, 1909, 2 S.L.R. 472	464
Canada Settlers Loan Co. v. Nicholles, 1896, 5 B.C.R. 41	389
Canada Trust Co. v. Layton, 1916, 9 S.L.R. 244, 30 D.L.R. 283..	379
Canadian Bank of Commerce v. Forbes, 1885, 10 O.P.R. 442..	328
Canadian Bank of Commerce v. Rolston, 1902, 4 O.L.R. 106 ..	260, 263
Canadian Mining and Investment Co. v. Wheeler, 1902, 3 O.L.R. 210	260
Canadian Mortgage Investment Co. v. Cameron, 1917, 55 Can. S.C.R. 409, 38 D.L.R. 428, reversing 11 A.L.R. 441, 33 D.L.R. 792	601
Canadian Pacific Ry. Co. v. Silzer, 1910, 3 S.L.R. 162	170
Capell v. Winter, [1907] 2 Ch. 376	95, 96
Capital and Counties Bank v. Rhodes, [1903] 1 Ch. 631	161, 163, 183, 338
Carpenter v. Parker, 1857, 3 C.B.N.S. 206.....	255
Carr, Ex parte, In re Hofman, 1879, 11 Ch.D. 62	620
Carr v. Fire Insurance Association, 1887, 14 O.R. 487	727
Carriek v. Smith, 1874, 35 U.C.R. 348	312
Carroll v. Robertson, 1868, 15 Gr. 173	581, 587, 679
Carruthers v. Hamilton Provident and Loan Society, 1898, 12 M.R. 60	668
Carson v. Simpson, 1894, 25 O.R. 385	21

Carter, Ex parte, 1773, Amb. 733	142
Carter v. Bell, 1915, 21 B.C.R. 55, 21 D.L.R. 243	674
Carter v. Grasett, 1888, 14 O.A.R. 685	311
Carter and Justins, In re, Ex parte Sheffield Union Banking Co., 1865, 13 L. T. 477	78
Carter v. Stone, 1890, 20 O.R. 340	233
Carter v. Wake, 1877, 4 Ch.D. 605	122, 388
Carver v. Richards, 1860, 27 Beav. 488	677
Casborne v. Scarfe, 1737, 1 Atk. 603, 2 W. & T.L.C. Eq. 6, 18 R.C. 369	53, 216, 296, 414
Caso v. Bartlett, 1898, 12 M.R. 280	124
Cash v. Belcher, 1842, 1 Hare 310	627
Casner v. Haight, 1884, 6 O.R. 451	413
Cassels v. Hudson, In re Hudson, [1908] 1 Ch. 655	266
Cassidy v. Cassidy, 1889, 24 L.R. Ir. 577	4
Castell & Brown, In re, [1898] 1 Ch. 135	95
Castellain v. Preston, 1883, 11 Q.B.D. 380	714, 724, 725
Cattanach v. Urquhart, 1873, 6 O.P.R. 28	418
Cave v. Cave, 1880, 15 Ch.D. 639	100
Cayley v. Hodgson, 1867, 13 Gr. 433	421
Central Canada Loan and Savings Co. and Yanover, Re, 1915, 8 O.W.N. 522	747
Central Trust Co. v. Algoma Steel Co., 1903, 6 O.L.R. 464	398
Challinor, Ex parte, In re Rogers, 1880, 16 Ch.D. 260	618
Chalmers v. Freedman, 1909, 18 M.R. 523	353
Chambers v. Goldwin, 1804, 9 Ves. 254	506, 588, 592
Champion v. White v. World Building, 1916, 22 B.C.R. 596, 27 D.L.R. 506	132
Chaplin v. Young (no. 1), 1864, 33 Beav. 330	584
Chapman v. Purtell, 1915, 25 M.R. 76, 22 D.L.R. 860	742
Chapman v. Smith, [1907] 2 Ch. 97	255, 583
Chaproniere v. Lambert, [1917] 2 Ch. 356	73
Charles v. Jones, 1886, 33 Ch.D. 80	623
Charles v. Jones, 1887, 35 Ch.D. 544	682, 683
Charters v. McCracken, 1916, 36 O.L.R. 153, 29 D.L.R. 756	131
Chatfield v. Cunningham, 1892, 23 O.R. 153	454, 677, 680
Chawnor's Will, In re, 1869, L.R. 8 Eq. 569	633
Chennel v. Martin, 1833, 4 Sim. 340	439
Chetwynd v. Allen, [1899] 1 Ch. 356	340
Chew v. Traders Bank of Canada, 1909, 19 O.L.R. 74	717
Chinnery v. Evans, 1864, 11 H.L.C. 115	525, 527, 548
Chisholm v. Sheldon, 1850, 1 Gr. 318	595
Chishom v. Provincial Insurance Co., 1869, 20 U.C.C.P. 11	717
Cholmeley v. Paxton, 1825, 3 Bing. 207	670
Cholmley v. Countess Dowager of Oxford, 1741, 2 Atk. 267	512
Cholmondeley (Marquis) v. Clinton (Lord), 1820, 2 Jac. & W. 1, 134	505, 666

TABLE OF CASES.

xxx1

Chomley v. Firebrace, 1878, 5 V.L.R. 57, 1 Hunter's Torrens Title Cases 98	181
Christison v. Bolam, In re Gregson, 1887, 36 Ch.D. 223	682
Clagstone and Hammond, Re, 1897, 28 O.R. 409	183
Clark v. Barber, Re, 1894, 26 O.R. 47	371
Clark v. Bogart, 1889, 27 Gr. 450	248
Clark v. Harvey, 1888, 16 O.R. 159	644, 646, 653
Clarke v. Cooper, 1892, 15 O.P.R. 54	397
Clarke v. Freehold Loan and Savings Co., 1888, 16 O.R. 598.....	232
Clarke v. Millwall Dock Co., 1886, 17 Q.B.D. 494, 9 R.C. 655	706
Clarke v. Palmer, 1882, 21 Ch.D. 124	95
Clarkson v. Attorney-General of Canada, 1889, 16 O.A.R. 202 ...	274
Clarkson v. Henderson, 1880, 14 Ch.D. 348	611
Clay v. Sharpe, 1802, 18 Ves. 346n.	632
Clary v. Aitken, 1914, 19 B.C.R. 369, 17 D.L.R. 548.....	52
Cliff v. Wadsworth, 1843, 2 Y. & C.C.C. 598	498
Clowes v. Hughes, 1870, L.R. 5 Ex. 160	703
Coast Lumber Co. v. McLeod, 1914, 7 S.L.R. 382, 20 D.L.R. 343..	185
Cockburn v. Edwards, 1881, 18 Ch.D. 449	81, 521, 583, 606
Cockell v. Taylor, 1852, 15 Beav. 103	203
Coldwell v. Hall, 1862, 9 Gr. 110	589, 591, 596
Coleman v. Winch, 1721, 1 P. Wms. 775	150
Collins v. Cunningham, Cunningham v. Drysdale, 1892, 21 Can. S.C.R. 139	658
Collins v. Shirley, 1830, 1 R. & My. 638	406
Collinson v. Jeffrey, [1896] 1 Ch. 644	451, 512
Colonial Investment and Loan Co. v. King, 1902, 5 N.W.T.L.R. 371	473
Colquhoun v. Murray, 1899, 26 O.A.R. 204	531
Colston v. Roberts, In re Fleck, 1888, 37 Ch.D. 677	273
Colyer v. Colyer, Pawley v. Colyer, 1863, 3 DeG. J. & Sm. 676....	325
Coming, Ex parte, 1803, 9 Ves. 115, 18 R.C. 44	79
Commercial Bank v. Breen, 1889, 15 V.L.R. 572, 1 Hunter's Torrens Title Cases 407	189
Commercial Bank v. Watson, 1859, 5 U.C.L.J. 163	658
Commercial Union Assurance Co. v. Temple, 1898, 29 Can. S.C.R. 206	713
Compton (Lord) v. Oxenden, 1793, 4 Bro. C.C. 396	343
Confederation Life Association v. Leier, 1908, 1 S.L.R. 131.....	622
Continental Oxygen Co., In re, Elias v. The Co., [1897] 1 Ch. 511	391, 399
Constable v. Guest, 1858, 6 Gr. 510	587
Converse v. Michie, 1865, 16 U.C.C.P. 167	124
Cook's Mortgage, In re, Lawledge v. Tyndall, [1896] 1 Ch. 923..	682
Cook v. Belshaw, 1893, 23 O.R. 545	133, 134
Cook v. Dawson, 1861, 29 Beav. 123	633
Cook v. Fowler, 1874, L.R. 7 H.L. 27, 14 R. 545.....	602, 604, 605

TABLE OF CASES.

Cook v. Guerra, 1872, L.R. 7 C.P. 132	251
Cook v. Koldoffsky, 1916, 36 O.L.R. 555, 28 D.L.R. 346	132, 133
Cook v. Thomas, 1876, 24 W.R. 427	584
Cooke v. Loxley, 1792, 5 T.R. 4, 15 R.C. 297	706
Cooley v. Smith, 1877, 40 U.C.R. 543	121
Coolidge v. Nelson, 1900, 31 O.R. 646	121
Coombe, Ex parte, In re Beavan, 1819, 4 Madd. 249, 20 R.R. 294	78
Cooper, In re, Cooper v. Vesey, 1882, 29 Ch.D. 611	127, 412
Cooper and Allen's Contract, In re, 1876, 4 Ch.D. 802	649
Cooper v. Anderson, 1912, 22 M.R. 428, 5 D.L.R. 218	177
Cooper v. Metropolitan Board of Works, 1883, 25 Ch.D. 472	20
Cope v. Cope, 1895, 26 O.R. 441	280
Cope v. Crichton, 1899, 30 O.R. 603	114
Copestake v. Hoper, [1908] 2 Ch. 10	18, 54, 266
Corbett v. Plowden, 1884, 25 Ch.D. 678	257
Corby v. Gray, 1888, 15 O.R. 1	235
Cordery v. Morgan, 1811, 18 Ves. 344, 18 R.C. 442	632
Corham v. Kingston, 1889, 17 O.R. 432	728
Cork (Earl of) v. Russell, 1871, L.R. 13 Eq. 210	505, 627
Cornwall v. Henriod, 1866, 12 Gr. 338	512
Corsellis v. Patman, 1867, L.R. 4 Eq. 156	621
Cotham v. West, 1839, 1 Beav. 380	597
Cotter, Re, 1903, 14 M.R. 485	644
Cotterell v. Stratton, 1872, L.R. 8 Ch. 295	497, 622, 623, 624
Cottrell v. Finney, 1874, L.R. 9 Ch. 541	498, 623, 624
County of Gloucester Bank v. Rudry Merthyr, etc. Colliery Co., [1895] 1 Ch. 629	589, 689, 690
Court v. Holland, 1880, 8 O.P.R. 213	434
Court v. Holland, 1881, 29 Gr. 19	201, 436, 590
Court v. Walsh, 1882, 9 O.A.R. 294, 1 O.R. 167	556, 558
Courtman v. Conyers, 1600, Acta Cancellariae 764	40
Coventry v. Annable, 1911, 4 S.L.R. 175, 425, affirmed <i>sub nom.</i> Annable v. Coventry, 1912, 46 Can. S.C.R. 573, 5 D.L.R. 661	177, 180, 181
Cowan v. Allan, 1896, 26 Can. S.C.R. 292	427
Cowper v. Green, 1841, 7 M. & W. 633, 18 R.C. 564	301
Cox v. Adams, 1904, 35 Can. S.C.R. 393	27
Cradock v. Scottish Provident Institute, 1894, 63 L.J. Ch. 15, 69 L.T. 380, 70 L.T. 718	76
Craig v. McKay, 1906, 12 O.L.R. 121	112
Crane v. Hoffman, 1916, 35 O.L.R. 412	24
Crawford v. Armour, 1867, 13 Gr. 576	385, 394
Crawford v. Meldrum, 1872, 19 Gr. 165	403
Creanier v. Gooderham, 1914, 7 S.L.R. 173, 17 D.L.R. 235	538, 564
Credit Foncier Franco-Canadien v. Shultz, 1893, 9 M.R. 70	(
Credit Foncier Franco-Canadien v. Shultz, 1894, 10 M.R. 158	458
Crerar & Muir, Re, 1879, 8 O.P.R. 56	630

TABLE OF CASES.

xxxiii

Crippen v. Ogilvie, 1869, 15 Gr. 568	596
Croft v. Powel, 1738, Comyns 603	632
Cronin, In re, [1914] 1 I.R. 23	5
Cronn v. Chamberlin, 1880, 27 Gr. 551	262, 263
Cronyn, Kew & Betts, Re, 1880, 8 O.P.R. 372	630
Crosbie v. Fenn, 1879, 26 Gr. 283	428
Crosbie-Hill v. Sayer, [1908] 1 Ch. 866	104, 312, 341
Croskery, Re, 1888, 16 O.R. 207	285, 288
Crow v. Campbell, 1884, 10 V.L.R. 186, 1 Hunter's Torrens Title Cases 87	181
Crowdy, Re, Burges v. Crowdy, 1882, 46 L.T. 71	76
Croxon v. Lever, 1863, 12 W.R. 437	421
Cruso v. Bond, 1882 1 O.R. 384	491
Cruso v. Close, 1879, 8 O.P.R. 33	457
Cummins v. Fletcher, 1880, 14 Ch.D. 699	41, 137, 138, 140
Cummins v. Harrison, 1868, 1 Ch. Ch. (Ont.) 369	402
Cundiff v. Fitzsimmons, [1911] 1 K.B. 513	19
Cunningham v. Drysdale, Collins v. Cunningham, 1892, 21 Can. S.C.R. 139	658
Cunningham v. Hamilton, 1897, 5 B.C.R. 539	604, 605
Curler v. Clark, 1849, 3 Ex. 375	502
Currie v. Currie, 1910, 20 O.L.R. 375	526
Currie v. Sperer, 1915, 9 O.W.N. 174	440
Curtis v. Sheffield, 1882, 20 Ch.D. 398	550
Cut-Rate Plate Glass Co. v. Soledinski, 1915, 34 O.L.R. 604, 25 D.L.R. 533	132
Daigneau v. Dagenais, 1903, 5 O.L.R. 265	624
Dallas, In re, [1904] 2 Ch. 385	94
Dance v. Goldingham, 1873, L.R. 8 Ch. 402	672
Daniell v. Sinclair, 1881, 6 App. Cas. 181, 18 R.C. 144	600, 604, 611
Darby's Estate, In re, Rendall v. Darby, [1907] 2 Ch. 465	243, 246
Darling v. Wilson, 1869, 16 Gr. 255	404
Darrell v. Whitehot, 1669, 2 Rep. in Ch. 59	92
Davenport v. James, 1847, 7 Hare 249	399
Davey v. Durrant, 1857, 1 DeG. & J. 535	666, 667, 672
Davidson v. Boyes, 1873, 6 O.P.R. 27	412
Davidson v. McKay, 1867, 26 U.C.R. 306	111
Davis v. Barrett, 1851, 14 Beav. 542	201, 344
Davis v. Dendy, 1818, 3 Madd. 170	588
Davis v. White, 1869, 16 Gr. 312	438
Day v. McLea, 1889, 22 Q.B.D. 610	502
Dearle v. Hall, 1823, 3 Russ. 1, 10 R.C. 478	94
DeBeck v. Canada Permanent Loan and Savings Co., 1907, 12 B.C.R. 409	662
DeBeers Consolidated Mines v. British South Africa Co., [1912] A.C. 52	75

Dedford v. Boulton, 1878, 25 Gr. 561.....	507, 563
Delaney v. Canadian Pacific Ry. Co., 1891, 21 O.R. 11....	360, 530, 538
Delaney v. Fox, 1857, 2 C.B.N.S. 768, 15 R.C. 299.....	706
Delbridge v. Brantford (Township), 1917, 40 O.L.R. 443, 38 D.L.R. 677.....	113
DeLisle v. Union Bank of Scotland, [1914] 1 Ch. 22.....	200
DeNicholls v. Saunders, 1870, L.R. 5 C.P. 589.....	251
Dennistoun v. Fyfe, 1865, 11 Gr. 372.....	74
Deschamps v. Miller, [1908] 1 Ch. 856.....	391
Detillin v. Gale, 1802, 7 Ves. 583, 18 L.C. 502.....	617, 620, 622, 623
Dibb v. Walker, [1893] 2 Ch. 429.....	521
Dibbins v. Dibbins, [1896] 2 Ch. 348.....	51
Dickenson v. Harrison, 1817, 1 Price 282, 18 R.C. 474.....	370
Dicker v. Angerstein, 1876, 3 Ch.D. 600.....	678, 679
Dickinson v. Burrell, 1866, L.R. 1 Eq. 337.....	231
Dilke v. Douglas, 1880, 5 O.A.R. 63.....	218, 223, 224, 308, 311, 315
Dingle v. Coppen, [1899] 1 Ch. 726.....	530
Dixon v. Muckleston, 1872, L.R. 8 Ch. 155.....	79, 95
Pohsen v. Land, 1850, 8 Hare 216.....	575, 724
Iodds v. Harper, 1916, 37 O.L.R. 37, 32 D.L.R. 22.....	200
Podson v. Downey, [1901] 2 Ch. 620.....	234
Doe dem. Anderson v. Todd, 1845, 2 U.C.R. 82.....	57
Doe dem. Bryant v. Cunard, 1843, 2 Kerr (N.B.) 193.....	352
Doe dem. Carter v. Barnard, 1849, 13 Q.B. 945.....	555, 563
Doe dem. Curzon v. Edmunds, 1840, 6 M. & W. 295.....	547
Doe dem. Dixie v. Davies, 1851, 7 Ex. 89.....	699
Doe dem. Dunlop v. McNab, 1859, 5 U.C.R. 289.....	556
Doe dem. Fisher v. Giles, 1829, 5 Bing. 421.....	352
Doe dem. Garrod v. Olley, 1840, 12 A. & E. 481....	258, 352, 357, 699
Doe dem. Higginbotham v. Barton, 1840, 11 Ad. & E. 307.....	354
Doe dem. Holderness v. Donnelly, 1846, 3 Kerr (N.B.) 238.....	194
Doe dem. Holt v. Roe, 1830, 6 Bing. 447.....	621
Doe dem. Hughes v. Bucknell, 1838, 8 C. & P. 566.....	257
Doe dem. Jones v. Williams, 1836, 5 A. & E. 291.....	543
Doe dem. Jukes v. Sumner, 1845, 14 M. & W. 39.....	555
Doe dem. Matthewson v. Wright, 1801, 4 Esp. 5.....	655
Doe dem. McIntosh v. McDonell, 1835, 4 U.C.O.S. 195.....	60
Doe dem. McKenzie v. Rutherford, 1844, 1 U.C.R. 172.....	59
Doe dem. Pell v. Mitchener, 1831, Draper 471.....	117
Doe dem. Perry v. Henderson, 1847, 3 U.C.R. 486.....	547
Doe dem. Richardson v. Dickson, 1832, 2 U.C.O.S. 292.....	264
Doe dem. Roby v. Maisey, 1828, 8 B. & C. 767.....	354
Doe dem. Rogers v. Cadwallader, 1831, 2 B. & Ad. 473.....	256
Doe dem. Ross v. Papst, 1853, 8 U.C.R. 574.....	77
Doe dem. Roylance v. Lightfoot, 1841, 8 M. & W. 553.....	355, 543
Doe dem. Slason v. Hanson, 1857, 8 N.B.R. (3 Alien) 427.....	217
Doe dem. Spafford v. Brown, 1833, U.C.O.S. 92.....	60

TABLE OF CASES.

xxxv

<i>Doe dem.</i> Webster v. Fitzgerald, 1839, E.T. 2 V., 4 Ont. Dig. 2647	263
<i>Doe dem.</i> Whitaker v. Hales, 1831, 7 Bing. 322.....	256
<i>Doe dem.</i> Wood v. Fox, 1846, 3 U.C.R. 131.....	193
Dolman v. Nokes, 1855, 22 Beav. 402	674
Dolphin v. Aylward, 1870, L.R. 4 H.L. 486.....	245, 247
Dolsen, Re, 4 U.C. Chy. Ch. 36.....	311
Dominion of Canada Investment and Debenture Co. v. Carstens, 1917, 10 S.L.R. 272, 36 D.L.R. 25.....	238
Dominion of Canada Investment and Debenture Co. v. Gelhorn, 1917, 10 S.L.R. 278, 36 D.L.R. 154.....	238
Donnison Savings and Investment Society v. Kilttridge, 1876, 23 Gr. 631.....	146, 147
Donisthorpe v. Porter, 1762, 2 Eden 162	339
Donovan v. Bacon, 1869, 16 Gr. 472.....	260
Doody, In re, Hibbert v. Lloyd, [1893] 1 Ch. 129.....	629
Dougall v. Dougall, 1879, 26 Gr. 401.....	488
Douglas v. Mutual Life Assurance Co., 1918, 13 A.L.R. 18, 38 D.L.R. 459, 39 D.L.R. 601, reversed, <i>sub nom.</i> Mutual Life Assurance Co. v. Douglas, 1918, 57 Can. S.C.R. 243, 44 D.L.R. 115	161, 470, 485
Douglas v. Patrick, 1790, 3 T.R. 683.....	498
Douglass v. Culverwell, 1862, 4 DeG. F. & J. 20.....	624
Doull v. Doelle, 1905, 10 O.L.R. 411.....	374
Downe (Viscount) v. Morris, 1844, 3 Hare 394.....	219, 267
Downes v. Cottam, In re Beddoe, [1893] 1 Ch. 547.....	620, 623
Downes v. Grazebrook, 1817, 3 Mer. 200.....	673
Downey v. Parnell, 1882, 2 O.R. 82.....	607
Dawson and Jenkin's Contract, In re, [1904] 2 Ch. 19.....	647
Doyle v. Kauffman, 1877, 3 Q.B.D. 7, 340.....	550
Drake v. Kershaw, In re Kershaw, 1888, 37 Ch.D. 671.....	272
Drake v. Mitchell, 1893, 3 East 251.....	704
Drax, In re, Savile v. Drax, [1903] 1 Ch. 781.....	599
Drayton v. Loveridge, In re Loveridge, [1902] 2 Ch. 859.....	216
Drewry v. Percival, 1909, 19 O.L.R. 463	35
Drinkwater and Kerr, Re, 1907, 15 O.L.R. 76.....	628
Driver v. Broad, [1893] 1 Q.B. 744.....	83
Brought v. Redford, 1827, 1 Moll. 572.....	393
Dryden v. Frost, 1838, 3 My. & Cr. 670.....	192, 617, 619
Drysdale v. Piggott, 1856, 8 DeG. M. & G. 546.....	50
Dublin (Corporation) v. Judge, 1847, 11 Ir. L.R. 8.....	546
Duder v. Amsterdamsch Trustees Kantoor, [1902] 2 Ch. 132....	391
Dumble v. Larush, 1878-9, 25 Gr. 552, 27 Gr. 187.....	535
Dumble v. McIntosh, In re Music Hall Block, 1884, 8 O.R. 225, 280, 310	
Dundas v. Desjardins Canal Co., 1870, 17 Gr. 27.....	77
Dunlop, In re, Dunlop v. Dunlop, 1882, 21 Ch.D. 583.....	243
Dunn v. Attorney-General, 1864, 10 Gr. 482.....	392

Dunstan v. Patterson, 1847, 2 Ph. 341.....	325
Durham v. Lankester, Durham v. Armstrong, Aldrich v. Cooper, 1802, 18 Ves. 382, 18 R.C. 198, 1 W. & T.L.C. Eq. 35.....	244
Duty of Registrar in Mortgage Proceedings, Re, [1917] 1 W.W.R. 331.....	479
DuVigier v. Lee, 1843, 2 Hare 326.....	529
Dymond v. Croft, 1876, 3 Ch.D. 512.....	395
Dyson v. Morris, 1842, 1 Hare 413.....	455
Earle v. Harrison, 1909, 4 N.B. Eq. 196.....	593
East v. Clarke, 1915, 33 O.L.R. 624, 23 D.L.R. 74.....	550
Eastman v. Bank of Montreal, 1885, 10 O.R. 78.....	276
Eaton v. Dorland, 1893, 15 O.P.R. 138.....	488
Economic Life Assurance Society v. Osborne, [1902] A.C. 147..	605
Edmonds v. Hamilton Provident and Loan Society, 1891, 18 O.A.R. 347.....	609, 707, 708, 709, 727, 728, 729
Edmondson v. Copland, [1911] 2 Ch. 301.....	494, 497
Edmonton Mortgage Co. v. Gross, 1911, 3 A.L.R. 500.....	479
Edmunds v. Waugh, 1866, L.R. 1 Eq. 418, 16 R.C. 291.....	529
Edwards v. Standard Rolling Syndicate, [1893] 1 Ch. 574.....	688
Edwards v. Countess of Warwick, 1723, 2 P. Wms. 171.....	608
Eglison v. Howe, 1879, 3 O.A.R. 566.....	202
Eider, The, [1896] P. 119.....	377
Ehas v. Continental Oxygen Co., In re the Co., [1897] 1 Ch. 511 391, 399	
Elliott, Re, 1917, 41 O.L.R. 276, 40 D.L.R. 649.....	33
Elliott v. Byers, 1917, 13 O.W.N. 107.....	421
Elliott v. Dearsley, 1880, 16 Ch.D. 322.....	273
Elliott v. Hunter, 1876, 24 Gr. 430.....	434
Elliott v. Jayne, 1865, 11 Gr. 412.....	344
Elliott v. McConnell, 1874, 21 Gr. 276.....	203, 205
Ellis, Ex parte, [1898] 2 Q.B. 79.....	382
Ellis v. Dellabough, 1869, 15 Gr. 583.....	673
Ellis v. Glover & Hobson, [1908] 1 K.B. 388.....	22, 23
Ellison v. Wright, 1827, 3 Russ. 458.....	620
Elton v. Curtels, 1881, 19 Ch.D. 49.....	443
Emerson v. Humphries, 1892, 15 O.P.R. 84.....	410
Emmanuel College v. Evans, 1625-6, 1 Rep. in Ch. 18.....	40
Engerson v. Smith, 1862, 9 Gr. 16.....	197, 313
England v. Codrington, 1758, 1 Eden 169.....	624
Entwisle v. Lenz, 1908, 14 B.C.R. 51.....	171
Errington, In re, Ex parte Mason, [1894] 1 Q.B. 11.....	233
Euclid Avenue Trusts Co. v. Hobs, 1911, 24 O.L.R. 447.....	27
Evans v. Elliott, 1838, 9 A. & E. 342.....	256
Evans v. Rival Granite Quarries, [1910] 2 K.B. 979.....	83
Ewart v. Dryden, 1867, 12 Gr. 50.....	500
Ewart v. Snyder, 1867, 13 Gr. 55.....	223

TABLE OF CASES.

xxxvii

Exclusion Life v. Prestniak, 1908, 1 S.L.R. 215.....	458
Eye v. Hanson, 1840, 2 Beav. 478.....	451
Ex re v. Hughes, 1876, 2 Ch.D. 148, 18 R.C. 385.....	585, 588
Lyre v. Wynn-Mackenzie, [1894] 1 Ch. 218	45, 629
Faber v. Earl of Lathom, 1897, 77 L.T. 168	415
Fairclough v. Marshall, 1878, L.R. 4 Ex. 37	359
Fairclough v. Swan Brewery Co., [1912] A.C. 565.....	43
Fairweather v. The Company, In re Metropolitan Amalgamated Estates, [1912] 2 Ch. 497.....	687
Faithful v. Woodley, 1889, 43 Ch.D. 287	416
Falcke v. Scottish Imperial Insurance Co., 1886, 34 Ch.D. 234..	576
Falkner v. Equitable Reversionary Society, 1858, 4 Drew. 352...	671
Fallon v. Keeman, 1866, 12 Gr. 388.....	45
Farah v. Glen Lake Mining Co., 1908, 17 O.L.R. 1.....	166
Farhall v. Farhall, 1871, L.R. 7 Ch. 123.....	370
Farley, Ex parte, In re New, 1841, 1 Mont. D. & DeG. 683.....	80
Farmer v. Pitt, [1902] 1 Ch. 954.....	81, 146
Farmers' Loan & Savings Co. v. Patchett, 1904, 6 O.L.R. 255, 8 O.L.R. 569.....	207
Farrand v. Yorkshire Banking Co., 1888, 40 Ch.D. 132.....	95
Farrant v. Lovell, 1750, 3 Atk. 723	579
Farrar v. Farrars, 1883, 40 Ch.D. 395.....	651, 666, 673, 675
Farrell v. Caribou Gold Mining Co., 1897, 30 N.S.R. 199.....	45
Farrer v. Lacy, Hartland & Co., 1885, 31 Ch.D. 42, affirming 25 Ch.D. 636.....	395, 422, 621, 672
Farrington v. Forrester, In re Jones, [1893] 2 Ch. 461..244, 246, 248	
Farrington v. Smith, 1894, 20 V.L.R. 90.....	190
Farrow v. Rees, 1840, 4 Beav. 18.....	95
Faulds v. Harper, 1886, 11 Can. S.C.R. 639, reversing 9 O.A.R. 537.....	505, 535, 560, 561, 562, 565
Faulkner v. Bolton, 1835, 7 Am. 319.....	512
Faulkner v. Faulkner, 1893, 23 O.R. 252.....	373
Fawcett v. Burwell, 1880, 27 Gr. 445.....	581
Fawell v. Andrew, 1917, 10 S.L.R. 162, 34 D.L.R. 12.....	696
Federal Life Assurance Co. v. Stinson, 1906, 13 O.L.R. 127, af- firmed <i>sub nom.</i> Scott v. Swanson, 1907, 39 Can. S.C.R. 229.....	148, 442
Fenwick v. Potts, 1856, 8 DeG. M. & G. 506.....	76
Fenwick v. Reed, 1816, 1 Mer. 114	5
Ferguson v. Frontenac, 1874, 21 Gr. 188.....	150
Fewings, Ex parte, In re Sneyd, 1883, 25 Ch.D. 338....605, 618, 619	
Fialkowski v. Fialkowski, 1911, 4 A.L.R. 10.....	78
Finch v. Gilray, 1889, 16 O.A.R. 484.....	550
Flinck v. Tranter, [1905] 1 K.B. 427	254, 687
Fink v. Patterson, 1860, 8 Gr. 417.....	51
Fink v. Robertson, 1907, 4 Commonwealth L.R. 864.....	485

First National Bank v. Cudmore, 1917, 10 S.L.R. 201, 34 D.L.R. 201.....	710, 711
Fish v. Bryce, 1909, 2 S.L.R. 111.....	181
Fisher Mortgage Sale, In re, 1911, 4 S.L.R. 374.....	682
Fisher v. Ross, 1914, 24 M.R. 773, 19 D.L.R. 69.....	742
Fisken v. McMullen, 1862, 12 U.C.C.P. 85.....	264
Fitzgerald v. Fitzgerald, 1903, 5 O.L.R. 279.....	283
Fitzgerald's Trustee v. Mellersh, [1892] 1 Ch. 385.....	491, 493
Fitzgibbon v. Duggan, 1865, 11 Gr. 188.....	263
Flack v. Longmate, 1845, 8 Beav. 420.....	278
Fleck In re, Colston v. Roberts, 1888, 37 Ch.D. 677.....	273
Fleming v. Palmer, 1866, 12 Gr. 226.....	207
Fletcher v. Fletcher, 1844, 4 Hare 67.....	373
Fletcher v. Rodden, 1882, 1 O.R. 155.....	536
Fleury v. Pringle, 1878, 26 Gr. 67.....	282
Flight v. Bentley, 1835, 7 Sim. 149.....	252
Flint v. Howard, [1893] 2 Ch. 54.....	243, 247, 504
Foakes v. Beer, 1884, 9 App. Cas. 605.....	383, 502
Foley v. Burnell, 1783, 1 Bro. C.C. 277.....	372
Foley v. Canada Permanent Loan and Savings Co., 1883, 4 O.R. 38	25
Forbes v. Jackson, 1882, 19 Ch.D. 615.....	506
Forbes v. Moffatt, 1811, 18 Ves. 384, 17 R.C. 380.....	339, 344
Ford v. Allen, 1869, 15 Gr. 565.....	529
Ford v. Earl of Chesterfield, 1853, 16 Beav. 516, 21 Beav. 426..	627
Ford v. Jones, 1862, 12 U.C.C.P. 358.....	359
Ford v. Older, 1867, L.R. 3 Eq. 461.....	56
Ford v. Steeples, 1844, 1 U.C. Jur. pt. 1, 282.....	451
Ford v. Wastell, 1847, 6 Hare 229.....	453
Forrest v. Laycock, 1871, 18 Gr. 611.....	282
Forrester v. Campbell, 1870, 17 Gr. 379.....	121
Forster v. Harvey, 1863, 4 DeG. J. & S. 59.....	460
Forster v. Hoggart, 1850, 15 Q.B. 155.....	659
Forster v. Ivey, 1901, 2 O.L.R. 480.....	242
Forster v. Patterson, 1881, 17 Ch.D. 132.....	559, 560, 561
Forsyth v. Bristowe, 1853, 8 Exch. 716.....	521
Fourth City Mutual Benefit Building Society v. Williams, 1879, 14 Ch.D. 140.....	312, 341
Fox, In re, Brooks v. Marston, [1913] 2 Ch. 75.....	557
Frail v. Ellis, 1852, 16 Beav. 350.....	388
Francis v. Harrison, 1889, 43 Ch.D. 183.....	412
Fraser, In re, Lowther v. Fraser, [1904] 1 Ch. 111, 726.....	272
Fraser v. Fairbanks, 1894, 23 Can. S.C.R. 79.....	235
Fraser v. Locie, 1863, 10 Gr. 207.....	434
Fraser v. Sutherland, 1851, 2 Gr. 442.....	112
Freehold Loan Co. v. McArthur, 1888, 5 M.R. 207.....	127
Freehold Loan Co. v. McLean, 1891, 8 M.R. 116.....	603, 604
Freem v. Brade, 1858, 2 DeG. & J. 582.....	50

TABLE OF CASES.

xxxix

Friend v. Young, [1897] 2 Ch. 421, 16 R.C. 193.....	517
Frisby, In re, Allison v. Frisby, 1889, 43 Ch.D. 106.....	522, 523, 527, 549
Frith and Osborne, In re, 1876, 3 Ch.D. 618.....	670
Frontenac Loan and Investment Society v. Hysop, 1892, 21, O.R. 577.....	233, 239
Fullerton v. Brydges, 1895, 10 M.R. 431	235
Fulton and McIntyre, Re, 1904, 7 O.L.R. 445.....	29
Furnwall v. Coombes, 1843, 5 Man. & G. 736.....	370
Fursdon v. Clogg, 1842, 10 M. & W. 572	546, 547
G. v. V., 1867, 2 Chy. Ch. (Ont.) 33.....	451
Gaillard v. Hawkins, 1884, 27 Ch.D. 298.....	267
Galbraith v. Morrison, 1860, 8 Gr. 289.....	201
Gandy v. Gandy, 1885, 30 Ch.D. 57.....	373
Gant v. Hobbs, In re Robinson's Settlement, [1912] 1 Ch. 717....	370
Gardiner v. Gardiner, 1832, 2 U.C.O.S. 554.....	60
Gardiner v. Munro, 1896, 28 O.R. 375.....	45
Gardner v. Brown, 1890, 19 O.R. 202	288
Garfitt v. Allen, Allen v. Longstaffe, 1887, 37 Ch.D. 48..	351
Garforth v. Bradley, 1755, 2 Ves. Sen. 675.....	494
Gaskell v. Gosling, [1896] 1 Q.B. 669.....	692
Gaskin v. Phoenix Insurance Co. 1866, 11 N.B.R. (6 Allen) 249..	714
Gatfield's Case, In re Metropolitan and Counties Permanent Investment Building Society [1911] 1 Ch. 698.....	558, 566
Gee v. Bell, 1887, 35 Ch.D. 160.....	417
Gee v. Liddell, [1913] 2 Ch. 62.....	415, 506
Gemmell v. Burn, 1878, 7 O.P.R. 381.....	446
Gemmill v. Nelligan, 1895, 26 O.R. 307.....	285, 288
General Finance, Mortgage and Discount Co. v. Liberator Permanent Benefit Building Society, 1878, 10 Ch.D. 15.....	351
Gentles v. Canada Permanent and Western Canada Mortgage Corporation, 1900, 32 O.R. 428.....	652
George v. Lang, 1916, 36 O.L.R. 180, 30 D.L.R. 502.....	745
George and Lang, Re, 1916, 36 O.L.R. 382, 30 D.L.R. 504.....	746
Gibbon, In re, Moore v. Gibbon, [1909] 1 Ch. 367.....	267, 341
Gibbons v. McDougall, 1879, 26 Gr. 214.....	651
Gibbs v. Cruickshank, 1873, L.R. 8 C.P. 454.....	255
Gibbs v. Messer, [1891] A.C. 248	155, 156, 167, 180
Gibson v. Nelson, 1901, 2 O.L.R. 500.....	429
Gifford (Lord) v. Lord Fitzharding, [1899] 2 Ch. 32.....	346
Gilbert v. Reeves & Co., 1911, 4 S.L.R. 97, affirming Gilbert v. Ullerich, 4 S.L.R. 56.....	75
Gilchrist and Island, Re, 1886, 11 O.R. 537....	643, 646, 653
Gilleland v. Wadsworth, 1877, 1 O.A.R. 82.....	198
Gillen v. Roman Catholic Episcopal Corporation of the Diocese of Kingston, 1884, 7 O.R. 146.....	501

Gilmour v. Myers, 1868, 2 Chy. Ch. (Ont.) 179.....	451
Gilmour v. Roe, 1874, 21 Gr. 284.....	232, 590
Gilmour and White, Re, 1887, 14 O.R. 694.....	648
Girardot v. Curry, 1917, 38 O.L.R. 350, 33 D.L.R. 272....	657, 661
Glass, Ex parte, Re Macdonald, 1863, 3 O.P.R. 138.....	629
Glass v. Freckleton, 1864, 10 Gr. 470.....	404
Glasscock v. Balls, 1889, 21 Q.B.D. 13.....	209
Glover v. Black, 1763, 1 Wm. Bl. 396, 3 Burr. 1394.....	712
Glover v. Southern Loan and Savings Co., 1901, 1 O.L.R. 59..	260, 261
Goddard v. O'Brien, 1882, 9 Q.B.D. 37.....	502
Godfrey v. Watson, 1747, 3 Atk. 517.....	594, 621
Gokuldoss Gopaldoss v. Rambux Seochand, 1884, L.R. 11 Ind.	
App. 126.....	347
Goldie v. Bank of Hamilton, 1900, 27 O.A.R. 619.....	719, 730
Goldsmid v. Stonehewer, 1852, 9 Hare App. xxxviii.....	412, 659
Goode v. Job, 1858, 28 L.J.Q.B. 1.....	547
Gooderham v. DeGrassi, 1850, 2 Gr. 135.....	421
Gooderham v. Moore, 1899, 31 O.R. 86.....	234
Gooderham v. Traders Bank, 1888, 16 O.R. 438.....	302, 325, 335
Goodman v. Boyes, 1890, 17 O.A.R. 528.....	520
Goodman v. Grierson, 1813, 2 Ball & B. 274, 18 R.C. 6.....	52
Gordon v. Eakins, 1869, 16 Gr. 363.....	596
Gordon v. Warren, 1897, 24 O.A.R. 44.....	375
Gorringe v. Irwell India Rubber and Gutta Percha Works, 1886,	
34 Ch.D. 128.....	196
Gough v. Wood & Co., [1894] 1 Q.B. 713.....	22
Gould v. Close, 1874, 21 Gr. 273.....	199
Governments Stock, etc., Co. v. Manda Ry. Co., [1897] A.C. 81	83
Gowland v. Garbutt, 1867, 13 Gr. 578.....	385, 394
Grace v. Kuebler and Brunner, 1917, 56 Can. S.C.R. 1, 39 D.L.R.	
39, affirming 11 A.L.R. 295, 33 D.L.R. 1.....	177, 198
Graham v. British Canada Loan and Investment Co., 1898, 12	
M.R. 244.....	576
Graham v. Crouchman, 1917, 41 O.L.R. 22, 39 D.L.R. 284.....	197
Graham v. Massey, In re Hawthorne, 1883, 23 Ch.D. 743.....	392
Graham v. Ross, 1884, 6 O.R. 154.....	378, 380, 623
Grahame v. Anderson, 1868, 15 Gr. 189.....	608
Grange v. Barber, 1868, 2 Chy. Ch. (Ont.) 189.....	513
Grant v. Canada Life Assurance Co., 1881, 29 Gr. 256.....	650
Gray v. Coughlin, 1891, 18 Can. S.C.R. 553, reversing MacLennan v.	
Gray, 1889, 16 O.A.R. 224, restoring 16 O.R. 321.....	285, 344
Gray v. Rienford, 1878, 2 Can. S.C.R. 431.....	555
Great West Lumber Co. v. Murrin & Gray, 1916, 11 A.L.R. 173,	
32 D.L.R. 485.....	238
Green v. Artkin, Re, 1887, 14 O.R. 697.....	644
Green & Platt, Re, 1913, 29 O.L.R. 103, 13 D.L.R. 547.....	316
Green v. Marsh, [1892] 2 Q.B. 330.....	704

TABLE OF CASES.

xli

Green v. Ponton, 1885, 8 O.R. 471.....	117
Green v. Stevenson, 1905, 9 O.L.R. 671.....	121
Green v. Wynn, 1869, L.R. 4 Ch. 204.....	506
Greenshields, In re, 1905, 6 N.W.T.L.R. 208.....	168
Greenwood v. Commercial Bank of Canada, 1867, 14 Gr. 40.....	501
Greet v. Citizens Insurance Co., 1880, 5 O.A.R. 596, affirming 27 Gr. 121.....	719
Gregg v. Slater, 1856, 22 Beav. 314.....	618
Gregon, In re, Christison v. Bolam, 1887, 36 Ch.D. 223.....	682
Grierson v. National Provincial Bank of England, [1913] 2 Ch. 18.....	96
Griffith v. Crocker, 1891, 18 O.A.R. 370.....	593
Griffith v. Owen, [1907] 1 Ch. 195.....	676
Griffith v. Pound, 1890, 15 Ch.D. 553.....	138, 407
Grigg v. Sturgis, 1846, 5 Hare 93.....	627
Gunn v. Harper, 1901, 2 O.L.R. 611.....	490
Gzowski v. Beatty, 1879, 8 O.P.R. 146.....	465
Haddington Island Quarry Co. v. Huson, [1911] A.C. 722.....	666
Haggerston v. Hanbury, 1826, 5 B. & C. 191.....	9
Haggert v. Brampton, 1897, 28 Can. S.C.R. 174.....	21
Hague, Re, Traders Bank v. Murray, 1887, 14 O.R. 660.....	288
Haldane v. Johnston, 1853, 8 Ex. 689.....	377
Hale, In re, Lilley v. Foad, [1899] 2 Ch. 107.....	521
Hall, Ex parte, In re Whitting, 1879, 10 Ch.D. 615.....	73
Hall v. Brown, 1858, 15 U.C.R. 419.....	609
Hall v. Caldwell, 1861, 7 U.C.L.J.O.S. 42, 8 U.C.L.J.O.S. 93, 560, 561	
Hall v. Howard, 1886, 32 Ch.D. 430.....	336, 505, 506, 589
Hall v. Morley, 8 U.C.R. 584.....	208, 367
Hallett v. Furze, 1885, 31 Ch.D. 312.....	512
Ham v. Ham, 1857, 14 U.C.R. 197.....	278, 280
Hamilton v. Chaine, 1881, 7 Q.B.D. 319.....	618
Hamilton (Township) v. Stevenson, 1877, 25 Gr. 198.....	460
Hamilton v. York and Baldry, 1913, 13 D.L.R. 3 (Alta.).....	653
Hamilton Provident and Loan Society v. Gilbert, 1884, 6 O.R. 434	124
Hamilton Provident Loan Co. v. Smith, 1888, 17 O.R. 1.....	257, 332
Hamilton's Windsor Ironworks, In re, Ex parte Pitman & Ed- wards, 1879, 12 Ch.D. 707.....	94
Hampson v. Fellows, 1868, L.R. 6 Eq. 575.....	702
Hand v. Blow, [1901] 2 Ch. 721.....	90
Hanford v. Howard, 1896, 1 N.B. Eq. 241.....	605
Hannington v. True, Giles v. True, In re Smith, 1886, 33 Ch.D. 195.....	273
Hansard v. Hardy, 1812, 18 Ves. 455.....	512
Hanson v. Derby, 1700, 2 Vern. 392, 9 R.C. 508.....	595
Harding v. Davies, 1825, 2 C. & P. 77.....	498
Harding v. Tingey, 1865, 10 Jur. N.S. 872.....	491
Harlock v. Ashberry, 1882, 19 Ch.D. 539.....	521, 526, 536, 549

Harmer v. Priestley, 1853, 16 Beav. 569	499
Harper v. Culbert, 1883, 5 O.R. 152	682
Harrington v. Spring Creek Cheese Mfg. Co., 1904, 7 O.L.R. 319	98, 119
Harris v. Keith, 1911, 3 A.L.R. 222	571
Harris v. Prentiss, 1880, 30 U.C.C.P. 381, varied, <i>sub nom.</i> Harris v. Mudie, 1882, 7 O.A.R. 114	535
Harrison, Ex parte, In re Betts, 1881, 18 Ch.D. 127	700, 702
Harrison, Re, 1915, 25 O.L.R. 45, 26 D.L.R. 157	124
Harrison v. Grier, 1869, 2 Ch. Ch. (Ont.) 446	402
Harrison v. Hollins, 1812, 1 S. & St. 471	558
Harrison v. Owen, 1738, 1 Atk. 520, 18 R.C. 564	304
Harron v. Yemen, 1882, 3 O.R. 126	67
Harter v. Colman, 1882, 19 Ch.D. 630	141, 143, 145, 202
Harvey, In re, Harvey v. Hobday, [1896] 1 Ch. 137	346
Haskill v. Fraser, 1862, 12 U.C.C.P. 383	280
Hasklem v. Equity Fire Insurance Co., 1904, 8 O.L.R. 246	717, 718
Hatt v. Park, 1858, 6 Gr. 553	628
Hawke v. Milliken, 1866, 12 Gr. 236	51, 52
Hawthorne, In re, Graham v. Massey, 1883, 23 Ch.D. 743	392
Haydon v. Williams, 1830, 7 Bing. 163	547
Hayes v. Hayes, 1881, 8 O.P.R. 516	441
Hayes v. Hayes, 1881, 29 Gr. 90	626
Hazeldine's Trusts, In re, [1908] 1 Ch. 34	557
Healey v. Daniels, 1868, 14 Gr. 633	52
Heams v. Bance, 1748, 3 Atk. 620	150
Heath v. Chim, [1908] W.N. 120	622
Heath v. Pugh, 1881, 6 Q.B.D. 345, 16 R.C. 376, affirmed <i>sub nom.</i> Pugh v. Heath, 1882, 7 App. Cas. 235, 16 R.C. 389	353, 358, 449, 536, 552, 561
Heaton v. Beachey, In re Beachey, [1904] 1 Ch. 67	186, 194
Heck v. Knapp, 1861, 20 U.C.R. 369	360
Hedworth v. Primate, 1662, Hardres 318	137
Henderson v. Astwood, [1894] A.C. 150	585, 586, 673
Henderson v. Bank of Hamilton, 1893, 23 Can. S.C.R. 716, affirming 20 O.A.R. 646	489
Henderson v. Brown, 1871, 18 Gr. 89	202
Henderson v. Henderson, 1896, 23 O.A.R. 577	544
Honey v. Kerr, 1914, 30 O.L.R. 506, 19 D.L.R. 597	118
Hermann v. Hodges, 1873, L.R. 16 Eq. 18	633
Hesse v. Briant, 1856, 2 Jur. N.S. 922	647
Hetherington v. Sinclair, 1915, 34 O.L.R. 61, 23 D.L.R. 630	53, 95, 391, 653
Heward v. Wolfenden, 1868, 14 Gr. 188	262, 263
Hewitt v. Barr, [1891] 1 Q.B. 98	550
Hunt v. Hillman, 1871, 19 W.R. 694	677
Hibbert v. Lloyd, In re Doody, [1893] 1 Ch. 129	629

TABLE OF CASES.

xlii

Hicks v. Williams, 1888, 15 O.R. 228	554
Higgins v. Trusts Corporation of Ontario, 1900, 27 O.A.R. 432 ..	239
Higgs v. Scott, 1849, 7 C.B. 63	253
Hildyard, In re, Ex parte Smith, 1842, 2 Mont. D. & DeG. 587 ..	208
Hill v. Forsyth, 1859, 7 Gr. 461	438
Hill v. Rowlands, [1897] 2 Ch. 361	495
Hilton v. Woods, 1867, L.R. 4 Eq. 432	231
Hind v. Gidlow, 1915, 8 O.W.N. 327	746
Hind v. Poole, 1855, 1 K. & J. 383	649
Hirst & Capes, v. Fox, [1908] A.C. 416, affirming, with a variation, In re Hirst & Capes, [1908] 1 K.B. 982	630
Hislop v. Joss, 1901, 3 O.L.R. 281	577
Hitchcock v. Humphrey, 1843, 5 Man. & G. 559	376
Hixon v. Reaveley, 1904, 9 O.L.R. 6	58, 578
Hobart v. Abbott, 1731, 2 P. Wms. 643	407
Hobbs v. Ontario Loan and Debenture Co., 1890, 18 Can. S.C.R. 483	694, 697, 698, 700, 701, 702
Hobson v. Gorringe, [1897] 1 Ch. 182, 12 R.C. 208	21, 23, 95, 97
Hodge v. Attorney-General, 1839, 3 Y. & C. 342	392
Hodges v. Croydon Canal Co., 1840, 3 Beav. 86	624
Hodson v. Deans, [1903] 2 Ch. 647	673
Hodson and Howes' Contract, In re, 1887, 35 Ch.D. 668	676
Hofman, In re, Ex parte Carr, 1879, 11 Ch.D. 62	620
Holborrow v. Lloyd, 1859, 5 Jur. N.S. 114	618
Holcumb v. Leach, 1852, 3 Gr. 449	436
Holford v. Yate, 1855, 1 K. & J. 677	454
Holland v. Hodgson, 1872, L.R. 7 C.P. 328	21
Holland v. Smith, 1806 6 Esp. 11	50
Hollingshead, In re, Hollingshead v. Webster, 1888, 37 Ch.D. 651.	521
Holmes v. Matthews, 1855 9 Moo. P.C. 413, 5 Gr. 108	51
Hood v. Easton, 1856, 2 Jurist N.S. 729	507
Hood v. Phillips, 1841, 3 Beav. 513, 18 R.C. 535	343
Hooker v. Morrison, 1881, 28 Gr. 369	547
Hoole v. Smith, 1881, 17 Ch.D. 434	657
Hooman, Ex parte, In re Vining, 1870, L.R. 10 Eq. 63	594
Hooper, Ex parte, 1815, 19 Ves. 477	73
Hopkins Estate, Re, 1900, 32 O.R. 315	270
Hopkinson v. Rolt, 1861, 9 H.L.C. 514, 3 R.C. 523	122
Hopper v. Harrison, 1880, 28 Gr. 22	404
Hornsey Local Board v. Monarch Investment Building Society, 1889, 24 Q.B.D. 1	524
Hosking v. Smith, 1888, 13 App. Cas. 582	310, 312
Houston, Re, Houston v. Houston, 1882, 2 O.R. 84	494, 608
How v. Vigures, 1628-9, 1 Rep. in Ch. 32	41
Howard v. Harding, 1871, 18 Gr. 181	674
Howard v. Harris. 1683, 1 Vern 190, 2 W. & T.L.C. Eq. 11, 18 R.C. 358	42, 43, 46

Howard v. Lightfoot, In re Lacey, [1907] 1 Ch. 330	527
Howard v. Macara, 1859, 1 U.C. Chy. Ch. 27	454
Howel v. Price, 1715, 1 P. Wms. 291	4
Howeren v. Bradburn, 1875, 22 Gr. 96	530
Hudson, In re, Cassels v. Hudson, [1908] 1 Ch. 655	266
Hughes v. Britannia Permanent Benefit Building Society, [1906]	
2 Ch. 607	143
Hughes v. Howard, 1858, 25 Beav. 575	91
Hughes v. Pump House Hotel Co., [1902] 2 K.B. 190	196
Hughes v. Williams, 1852, 3 Mac & G. 683	245
Hugill v. Wilkinson, 1888, 38 Ch.D. 480	544
Huguenin v. Baseley, 1807, 14 Ves. 273, W. & T.L.C. Eq. 259	27
Hunt v. Fownes, 1803, 9 Ves. 70	621
Hunt v. Luck, [1902] 1 Ch. 428	99
Hunt v. Neve, Neve v. Pennell, 1863, 2 Hem. & M. 170	138
Hunter v. Farr, 1864, 23 U.C.R. 324	217
Hunter v. Lord Langford, 1828, 2 Moll. 272	80
Hunter v. Nockolds, 1859, 1 Mac. & G. 640	529
Hutchinson v. Standard Bank of Canada, 1917, 39 O.L.R. 286, 26	
D.L.R. 378	27
Hutson and Davidson, Re, 1918, 13 O.W.N. 475	747
Hutton v. Brown, 1881, 45 L.T. 343	494
Hutton v. Justin, 1901, 2 O.L.R. 713	465
Hyde v. Barton, 1889, 8 O.P.R. 205	463
Hyde v. Chapin Co., 1916, 26 D.L.R. 381, 9 W.W.R. 1142	710, 711
Hyde v. Dalloway, 1843, 2 Hare 528	562
Hynes v. Smith, 1879, 27 Gr. 459	428
Ibbotson v. Rhodes, 1706, 2 Vern. 554, 18 R.C. 531	96
Idington v. Trusts and Guarantee Co., 1917, 11 A.L.R. 337, 34	
D.L.R. 86	451
Idle v. Starr, 1909, 19 O.L.R. 471	119
Illingworth v. Houldsworth, [1904] A.C. 355	83, 84
Imperial Bank of Canada v. Metcalfe, 1886, 11 O.R. 467	512, 528
Imperial Loan and Investment Co. v. Clement, 1896, 11 M.R.	
428, 445	702
Imperial Loan and Investment Co. v. O'Sullivan, 1879, 8 O.P.R.	
162	129
Imperial Trusts Co. v. New York Security and Trust Co., 1905,	
10 O.L.R. 289	603, 611
Inurray v. Oakshette, [1897] 2 Q.B. 218	99
Ind, Coope & Co. v. Emmerton, 1887, 12 App. Cas. 300, 21 R.C.	
792	101
Independent Lumber Co. v. Bocz, 1911, 4 S.L.R. 103	173
Independent Lumber Co. v. David and Hurlburt, 1911, 5 S.L.R.	
1, 316	701
Independent Lumber Co. v. Gardiner, 1910, 3 S.L.R. 140	177

TABLE OF CASES

xlv

Independent Order of Foresters v. Pegg, 1900, 19 O.P.R. 80	398
Independent Order of Foresters v. Pegg, 1900, 19 O.P.R. 254	448
Inman v. Wearing, 1850, 3 DeG. & S. 729	512
Insurance Co. v. Updegraff, 1853, 21 Penn 513	724
Irby v. Irby, 1855, 22 Beav. 217	150
Ismail v. Leth, 1890, 20 O.R. 361	113, 115, 120, 127
Jackson, Ex parte, In re Bowes, 1880, 14 Ch.D. 725	697, 700, 701
Jackson v. Hammond, 1879, 8 O.P.R. 157	402, 428
Jackson v. Yeomans, 1876, 39 U.C.R. 280	368
Jacob v. Earl of Suffolk, 1728, Mosely 27	443
James Ling, Re, 1908, 43 N.S.R. 60	553
James v. Blou, 1819, 3 Swanst. 234, 18 R.C. 166	325, 503
James v. James, 1873, L.R. 16 Eq. 153	81, 388
James v. Kerr, 1889, 40 Ch.D. 449	44, 611
James v. Rumsey, 1879, 11 Ch.D. 398	610
Jameson v. London and Canadian Loan and Agency Co., 1897, 27 Can. S.C.R. 435, reversing 23 O.A.R. 602	86, 87, 90
Jameson v. Stein, 1855, 21 Beav. 5	341
Jamieson v. London and Canadian Loan and Agency Co. (no. 2), 1899, 30 Can. S.C.R. 14, affirming 26 O.A.R. 116	89
Jared v. Clements, [1903] 1 Ch. 428	98
Jarrah, etc., Corporation v. Samuel, [1903] 2 Ch. 1, [1904] A.C. 323	46
Jefferys v. Dickson, 1866, L.R. 1 Ch. 183	692
Jellett v. Wilkie, 1896, 26 Can. S.C.R. 282, affirming 2 N.W.T.L.R. 133	171, 172, 178
Jenkins v. Jones, 1860, 2 Giff. 99	499, 667
Jenks, Ex parte, In re Wallis, [1902] 1 K.B. 719	79
Jennens, In re, 1880, 50 L.J. Ch. 4, 16 R.C. 359	545
Jennings v. Jordan, 1881, 6 App. Cas. 698, affirming Mills v. Jennings, 1880, 13 Ch.D. 639	136, 141, 143, 412, 659
Jennings v. Major, 1837, 8 C. & P. 61	499
Jennings v. Ward, 1705, 2 Vern. 520, 18 R.C. 365	43, 50
Jessop, In re, 1863, 32 Beav. 406	630
Jobson's Application, In re, [1918] W.N. 14	747
Johnson, Ex parte, 1875, 6 O.P.R. 225	315
Johnson v. Clark, [1908] 1 Ch. 303	27
Johnson v. Evans, 1889, 61 L.T. 18	494
Johnson v. Mounsey, In re Ahson, 1879, 11 Ch.D. 284	51, 390, 517, 563, 566, 582, 665
Johnson (Samuel) & Sons v. Brock, [1907] 2 Ch. 533	537, 544, 559
Johnston v. Consumers Gas Co., 1896, 17 O.P.R. 297	401
Johnston v. Johnston, 1882, 9 O.P.R. 259	453
Johnston v. Reid, 1881, 29 Gr. 293	34, 138, 146
Johnston v. Wade, 1908, 17 O.L.R. 372	84
Jones, Ex parte, 1835, 4 D. & C. 750	80

Jones's Estate, <i>In re</i> , [1911] 1 I.R. 188	604
Jones, <i>In re</i> , <i>Farrington v. Forrester</i> , [1893] 2 Ch. 461, 244, 246, 248	
Jones v. Beck, 1871, 18 Gr. 671	244, 248
Jones v. Creswicke, 1839, 9 Sim. 304	451, 452
Jones v. Gibbons, 1804, 9 Ves. 407	192, 194
Jones v. Kearney, 1842, 1 D. & War. 134	91, 234
Jones v. Matthie, 1847, 11 Jur. 504, on appeal from <i>Matthie v.</i> <i>Edwards</i> , 1846, 2 Coll. 465, 10 Jur. 347	665
Jones v. McGrath, 1888, 16 O.R. 617	199
Jones v. Morgan, 1783, 1 Bro. C.C. 206	343
Jones v. Shortreed, 1907, 11 O.L.R. 142	336
Jost v. McNish, 1893, 25 N.S.R. 519	117
Joy v. Birch, 1836, 4 Cl. & F. 58	51
Joyce, <i>In re</i> , <i>Ex parte Barclay</i> , 1874, L.R. 9 Ch. 576	669
Judd v. Green, 1875, 45 L.J. Ch. 198, 33 L.T. 597	205
 <i>Kaiserhof Hotel Co. v. Zuber</i> , 1912, 46 Can. S.C.R. 651, 9 D.L.R. 577, affirming 25 O.L.R. 194	666
<i>Kannreuther v. Gelzelbrecht</i> , <i>In re Kloebe</i> , 1884, 28 Ch.D. 175 ...	274
Kay v. Wilson, 1877, 2 O.A.R. 133, affirming 24 Gr. 212	488, 558
Kearsley v. Philips, 1883, 11 Q.B.D. 621	700
Keech v. Hall, 1778, Doug. 21, 18 R.C. 123	255, 354, 357, 504
Keech v. Sandford, 1726, Sel. Cas. in Ch. 61, 2 W. & T.L.C. Eq. 706	92, 676
Keefer v. Phoenix Insurance Co., 1901, 31 Can. S.C.R. 144 ...	714, 724
Keeler's Mortgage, <i>In re</i> , 1863, 32 L.J. Ch. 101	319
Keen v. Codd, 1891, 14 O.P.R. 182	410
Keenan v. Osborne, 1904, 7 O.L.R. 134	214
Keewatin Power Co. v. Kenora, 1906, 13 O.L.R. 237, 16 O.L.R. 184	58
Keith v. R. Gancia & Co., [1901] 1 Ch. 774	257
Kelcey, <i>In re</i> , <i>Tyson v. Kelcey</i> , [1899] 2 Ch. 530	77
Kelly v. Imperial Loan and Investment Co., 1885, 11 Can. S.C.R. 516, affirming 11 O.A.R. 526	677
Kelsey v. Kelsey, 1874, L.R. 17 Eq. 495	688
Kemp v. Lester, [1896] 2 Q.B. 162	699
Kennedy v. DeTrafford, [1897] A.C. 180, affirming [1896] 1 Ch. 762	666, 675
Kennedy v. Foxwell, 1906, 11 O.L.R. 389	411
Kennedy v. Green, 1834, 3 My. & K. 699, 21 R.C. 820	100
Kennedy v. Haddow, 1890, 19 O.R. 240	133
Kennedy v. Thomas, [1894] 2 Q.B. 759	376
Kensington, <i>Ex parte</i> , 1813, 2 Ves. & B. 79, 18 R.C. 30	78, 79
Kensington (Lord) v. Bouverie, 1885, 7 DeG. M. & G. 134	582
Kent v. Thomas, 1856, 1 H. & N. 473	501
Ker v. Ker, 4 I.R. Eq. 15	243, 246, 318
Kerby v. Kerby, 1856, 5 Gr. 587	586
Kerr's Policy, <i>In re</i> , 1869, L.R. 8 Eq. 321	599

TABLE OF CASES

xlvii

Kerr v. Colquhoun, 1911, 2 O.W.N. 521	602, 604
Kerr v. Styles, 1879, 26 Gr. 309	260
Kerrick v. Saffery, 1835, 7 Sim. 317	406
Kershaw, In re, Drake v. Kershaw, 1888, 37 Ch.D. 674	272
Kershaw v. Kalow, 1855, 1 Jur. N.S. 974	672
Kettlewell v. Watson, 1882, 21 Ch.D. 685	98
Kibble v. Fairthorne, [1895] 1 Ch. 219	555
King, Ex parte, 1750, 1 Atk. 300	142
King v. Bird, [1909] 1 K.B. 837	257
King v. Connor, 1863, 10 Gr. 364	436
King v. Edington (Parish), 1801, 1 East 288	632
King v. Freeman, 1867, 1 Chy. Ch. (U.C.) 350	421
King v. Keith, 1898, 1 N.B. Eq. 538	611
King v. King, 1735, 2 P. Wms. 358, 18 R.C. 1	367
King v. Stalith, 1843, 2 Hare 239, 18 R.C. 98	578, 579
King v. State Mutual Fire Insurance Co., 1851, 61 Mass. 1	724, 725
Kingsland Re. 1879, 8 O.P.R. 77	682
Kinnaird v. Trollope, 1888, 39 Ch.D. 636	
330, 331, 332, 335, 337, 373, 384, 406, 454, 497, 506, 623	
Kinnear v. Aspdon, 1892, 19 O.A.R. 468	111, 253
Kinsman v. Rouse, 1881, 17 Ch.D. 104	559, 560, 561, 565
Kirby v. Cowderoy, [1912] A.C. 599	563, 564
Kirkland v. Peatfield, [1903] 1 K.B. 756	523, 557
Kirkpatrick v. Howell, 1875, 22 Gr. 94	420
Kirkwood v. Thompson, 1865, 2 Hem. & M. 392, 2 DeG. J. & S.	
613	665, 675
Kitchin, In re, Ex parte Punnett, 1880, 16 Ch.D. 226	70, 699, 700
Klinek v. Ontario Industrial Loan and Investment Co., 1888, 16	
O.R. 562	695, 703
Kloebe, In re, Kannreuther v. Geislebrecht, 1884, 28 Ch.D. 175 ..	274
Knapp v. Bower, 1871, 17 Gr. 695	497
Knapp v. Cameron, 1858, 6 Gr. 559	378, 446
Knight, In re, Ex parte Volsey, 1882, 21 Ch.D. 442 ..	698, 699, 702, 706
Knight v. Marjoribanks, 1849, 2 Mac. & G. 10	56
Knox v. Gye, 1872, L.R. 5 H.L. 656	533
Kraus v. Arnold, 1822, 7 Moo. 59	498
Kreglinger v. New Patagonia Meat and Cold Storage Co., [1914]	
A.C. 25	38, 42, 44, 45, 46, 47, 48, 49, 302
Lacey, In re, Howard v. Lightfoot, [1907] 1 Ch. 330	527
Laidlaw v. Hartford Fire Insurance Co., 1916, 10 A.L.R. 7, 29	
D.L.R. 229	718
Laing v. Avery, 1867, 14 Gr. 33	551
Laing v. Ontario Loan and Savings Co., 1881, 46 U.C.R. 114	584
Lake v. Bell, In re Bell, 1886, 34 Ch.D. 462	517
Lake v. Biggar, 1860, 11 U.C.C.P. 170	498
Lakeman v. Mountstephen, 1874, L.R. 7 H.L. 17	243

Lally v. Longhurst, 1888, 12 O.P.R. 519	404
Lamb v. McCormack, 1857, 6 Gr. 249	393
Lambert v. Still, In re Webb, [1894] 1 Ch. 73	574
Landale v. McLaren, 1892, 8 M.R. 327	399
Landed Banking and Loan Co. v. Anderson, 1886, 3 M.R. 279	457
Landowners, etc., Co. v. Ashtford, 1880, 16 Ch.D. 411	287
Langdon Davies Motors Canada v. Gasoletric Motors, 1914, 32 O.L.R. 84	399
Langton v. Langton, 1855, 7 DeG. M. & G. 30	688
Larles v. Gurety, 1874, L.R. 5 P.C. 346	618
Larios v. Bonany y Guerty, 1873, L.R. 5 P.C. 346	80
Latch v. Bright, 1869, 16 Gr. 673	411
Latch v. Furlong, 1866, 12 Gr. 303	668, 680
LaVassure v. Heron, 1880, 45 U.C.R. 7	696
Law v. Glen, 1867, L.R. 2 Ch. 634	608, 692
Lawledge v. Tyndall, In re Cook's Mortgage, [1896] 1 Ch. 923	682
Lawley v. Hooper, 1745, 3 Atk. 278	4
Lawlor v. Lawlor, 1882, 10 Can. S.C.R. 191, reversing 6 O.A.R. 312	311
Leavance v. Galeworthy, 1857, 3 Jur. N.S. 1049	674
Lawrason v. Fitzgerald, 1862, 9 Gr. 371	457
Lawrence v. Humphries, 1865, 11 Gr. 299	400
Lawrie v. Rathbun, 1876, 38 U.C.R. 2	417
Laws v. Toronto General Trusts Corporation, 1904, 8 O.L.R. 522	786
Leas Hotel Co., In re, Salter v. The Company, [1902] 1 Ch. 332	690
LeBlanc, Re, 1916, 36 O.L.R. 135, 28 D.L.R. 389	273
Lee v. Morrow, 1866, 25 U.C.R. 604	310
Leech v. Leech, 1865, 24 U.C.R. 321	412
Leeds and Hanley Theatre of Varieties v. Broadbent, [1898] 1 Ch. 343	378, 381, 393
Lees v. Fisher, 1882, 22 Ch.D. 283	459
Lees v. Whiteley, 1866, L.R. 2 Eq. 143	719
Lehain v. Philpott, 1871, L.R. 10 Ex. 242	696
Leigh v. Burnett, 1881, 29 Ch.D. 231	91
Leitch v. Leitch, 1901, 2 O.L.R. 233	339, 336
Leitch v. McLellan, 1883, 2 O.R. 587	281
Leith v. Irvine, 1833, 1 My. & K. 277	692
LeNeve v. LeNeve, 1747, Amb. 436, 2 W. & T.L.C. Eq. 187, 21 L.R. 774	98, 128
Leonino v. Leonino, 1879, 10 Ch.D. 460	243
Le Lie, In re, Leshe v. French, 1883, 23 Ch.D. 552	776
Leslie, Re, 1893, 23 O.R. 143	488
LeTarge v. DeTuyll, 1852, 3 Gr. 595	623
Lett v. Hutchins, 1871, L.R. 13 Eq. 176	44
Levy v. Sewill, In re Moss, 1885, 31 Ch.D. 90	494, 606
Lewin v. Jones, 1881, 51 L.T. 59	628
Lewin v. Wilson, 1886, 11 App. Cas. 639	521, 527, 549

TABLE OF CASES

xlix

Loy v. Peter, 1858, 3 H. & N. 101	516
Lickorish, Ex parte, In re Wallis, 1890, 25 Q.B.D. 176, 588, 622, 629	
Life Interest and Reversionary Securities Corporation v. Hand-	
n-Hand Fire and Life Insurance Society, [1898] 2 Ch	
279	678
Lilley v. Foad, In re Hale, [1899] 2 Ch. 107	521
Lindsell v. Phillips, In re Powers, 1885, 43 Ch.D. 291	523
Linham v. McNeill, 1916, 10 A.L.R. 272, 31 D.L.R. 768	473
Ling (James), Re, 1908, 43 N.S.R. 60	553
Linstead v. Hamilton Provident and Loan Society, 1896, 11 M.R.	
199	698, 708
Liquidation Estates Purchase Co. v. Willoughby, [1898] A.C. 321	
345, 347	
Liste v. Reeve, [1902] 1 Ch. 53, [1902] A.C. 401	56
Little v. Brunker, 1880, 28 Gr. 191	624
Little v. H., 1872, 19 Gr. 267	231
Liverpool and London and Globe Insurance Co. v. Agricultural,	
etc. Co., 1903, 33 Can. S.C.R. 94, reversing Agricultural,	
etc. Co. v. Liverpool, etc. Co., 3 O.L.R. 127	718, 723
Livingston v. Wood, 1880, 27 Gr. 515	623, 624
Livingstone v. Western Assurance Co., 1868, 14 Gr. 461, 16 Gr. 9, 717	
Lloyd, In re, Allen v. Lloyd, 1879, 12 Ch.D. 447	689
Lloyd, In re, Lloyd v. Lloyd, [1903] 1 Ch. 385	529, 530
Lloyd v. Attwood, 1859, 3 DeG. & J. 614	79, 104
Lloyd v. Lander, 1821, 5 Madd. 282	406
Lloyds v. Harper, 1880, 16 Ch.D. 290	373
Lloyds Bank v. Bullock, [1896] 2 Ch. 192	196, 199
Lloyds Bank v. Pearson, [1901] 1 Ch. 865	94
Lockhart v. Hardy, 1846, 9 Beav. 349, 18 R.C. 434	349, 454
Lockhart v. Yorkshire Guarantee and Securities Corporation,	
1908, 14 B.C.R. 28	655, 678
Locking v. Halsted, 1888, 16 O.R. 32	667
Locking v. Parker, 1872, L.R. 8 Ch. 30	517, 665
Lockridge v. Lacey, 1870, 30 U.C.R. 494	499
Lodor v. Creighton, 1860, 9 U.C.C.P. 295	211
Løke Yew v. Port Swettenham Rubber Co., [1913] A.C. 491 ...	176
London and Canadian Loan and Agency Co. v. Everitt, 1881, 8	
O.P.R. 489	419
London and Canadian Loan and Agency Co. v. Morrison, 1879,	
7 O.P.R. 450	457
London and County Banking Co. v. Goddard [1897] 1 Ch. 642, 91, 319	
London and County Banking Co. v. Lewis, 1882, 21 Ch.D. 490, 81, 122	
London County and Westminster Bank v. Tompkins, [1918] 1	
K.B. 515	72, 388, 390
London Loan Co. v. Manley, 1896, 26 Can. ... R. 443, affirming	
Manley v. London Loan Co., 1896, 26 O.A.R. 139, ... 199, 200	
London Loan Co. v. Smyth, 1882, 32 U.C.C.P. 530	368

Long v. Long, 1870, 17 Gr. 251	498, 504
Longuet v. Scawen, 1750, 1 Ves. Sen. 402	5
Lord Advocate v. Lord Lovat, 1886, 5 App. Cas. 273.....	563
Loveday v. Chapman, 1875, 32 L.T. 689	438, 504
Loveridge, In re, Drayton v. Loveridge, [1902] 2 Ch. 859	216
Loveridge, In re, Pearce v. Marsh, [1904] 1 Ch. 518	216, 535
Lowell v. Bank of Upper Canada, 1863, 10 Gr. 57	259
Lowry v. Williams, [1895] 1 I.R. 274	605
Lowther v. Fraser, In re Fraser, [1904] 1 Ch. 111, 726	272
Louis v. Telford, 1876, 1 App. Cas. 414	258, 352, 354
Lucas v. Dennison, 1813, 13 Sim. 584	566
Luckhardt, Re, 1898, 29 O.R. 111.....	283, 285
Luckin v. Rushworth, 1678, Rep. t. Finch 392, 2 Rep in Ch. 113..	92
Ludbrook v. Ludbrook, [1901] 2 K.B. 96	549
Luke v. South Kensington Hotel Co., 1879, 11 Ch.D. 121	399
Lyon v. Ryerson, 1897, 17 O.P.R. 516	664
Lyons v. Elliott, 1876, 1 Q.B.D. 210	706
Lysaght v. Westmacott, 1864, 33 Beav. 417	302
Macdonald, Re, Ex parte Glass, 1863, 3 O.P.R. 138	629
Macdonald v. Bullivant, 1884, 10 O.A.R. 582	343
Macdonald v. Fox, 1917, 39 O.L.R. 261, 35 D.L.R. 198	27
Macdonald v. Macdonald, 1886, 11 O.R. 187	530
Macdonald (John) & Co. v. Tew, 1914, 32 O.L.R. 262	179
MacLennan v. Gray, 1889, 16 O.R. 321, reversed 16 O.A.R. 224, restored <i>sub nom.</i> Gray v. Coughlin, 1891, 18 Can. S.C.R. 553	285, 344
Maddever, In re, Three Towns Banking Co. v. Maddever, 1884, 27 Ch.D. 523	487
Maddison v. Alderson, 1883, 8 App. Cas. 467	73
Magneta Time Co., In re, Molden v. The Company, [1915] W.N. 318, 84 L.J. Ch. 814	330
Magnus v. Queensland National Bank, 1888, 37 Ch.D. 466	302
Mahar v. Fraser, 1867, 17 U.C.C.P. 408	537
Mainland v. Upjohn, 1889, 41 Ch.D. 126	611
Mair v. Kerr, 1851, 2 Gr. 223	419
Major, In re, 1897, 5 B.C.R. 244	345
Major v. Ward, 1847, 5 Hare, 598	651, 659, 660
Maloney v. Campbell, 1897, 28 Can. S.C.R. 228, affirming Camp- bell v. Morrison, 24 O.A.R. 224	236, 240
Mangles v. Dixon, 1852, 3 H.L.C. 702	198
Manitoba and Northwest Loan Co. v. Barker, 1892, 8 M.R. 296... 604, 611	
Manitoba and Northwest Loan Co. v. Scobell, 1885, 2 M.R. 125... 448	
Manitoba Lumber Co. v. Emerson, 1913, 18 B.C.R. 96, 14 D.L.R. 390	43, 586
Manks v. Whiteley, [1911] 2 Ch. 448, reversed [1912] 1 Ch. 735,	

TABLE OF CASES

11

restored <i>sub nom.</i> Whiteley v. Delaney, [1914] A.C. 132	
245, 339, 341, 342, 345, 346	
Manley v. London Loan Co., 1896, 23 O.A.R. 139, affirmed <i>sub</i>	
<i>nom.</i> London Loan Co. v. Manley, 1896, 26 Can. S.C.R.	
443	199, 200
Mann v. English, 1876, 38 U.C.R. 240	354, 360
Manners v. Mew, 1885, 29 Ch.D. 725, 8 R.C. 682	19
Manning v. Burges, 1663, 1 Cas. in Ch. 29	497
Markle v. Ross, 1889, 13 O.P.R. 135	434
Markwick v. Hardingham, 1880, 15 Ch.D. 339	563, 566, 567
Marlborough, In re Duke of, Davis v. Whitehead, [1894] 2	
Ch. 133	52
Marsh v. Lee, 1670, 2 Vent. 337, 2 W. & T.L.C. Eq. 118, 18 R.C.	
523	105, 137
Marshall v. Cave, 1825, 3 L.J. Ch. 57	595
Marshall v. Shrewsbury, 1875, L.R. 10 Ch. 250	512
Marshall Brick Co. v. York Farmer's Colonization Co., 1917, 54	
Can. S.C.R. 569, 36 D.L.R. 420, affirming Marshall Brick	
Co. v. Irving, 35 O.L.R. 542, 28 D.L.R. 464	133
Marshfield, In re, Marshfield v. Hutchins, 1887, 34 Ch.D. 721	529
Martin v. Evans, 1917, 39 O.L.R. 479, 37 D.L.R. 376	421, 563
Martin v. Hall, 1878, 25 Gr. 471	658
Martin and Merritt, Re, 1901, 3 O.L.R. 284	656, 657, 680
Martin v. Miles, 1883, 5 O.R. 404	255, 408, 486, 504, 565, 658
Martindale v. Clarkson, 1880, 6 O.A.R. 1	284
Martinson v. Clowes, 1882, 21 Ch.D. 857	674
Mason, Ex parte, In re Errington, [1894] 1 Q.B. 11	233
Mason v. Bogg, 1837, 2 My. & Cr. 443	276
Mason v. Johnston, 1893, 20 O.A.R. 412	502
Mason v. Mason, 1887, 13 O.R. 725	269, 273
Mason v. Westoby, 1886, 32 Ch.D. 206	689
Massey, Re, 1865, 34 Beav. 463	630
Massey v. Sladen, 1868, L.R. 4 Ex. 13	377
Matson v. Swift, 1841, 5 Jur. 645	608
Mathew v. Blackmore, 1857, 1 H. & N. 762	367, 370
Mathew v. McLean, 1908, 2 S.L.R. 301	448
Matthews v. Cartwright, 1742, 2 Atk. 347	76
Matthews v. Goodday, 1861, 31 L.J. Ch. 282	76
Matthews v. Usher, [1900] 2 Q.B. 575	359
Matthews v. Wallwyn, 1798, 4 Ves. 118, 18 R.C. 243	198, 201
Matthie v. Edwards, 1846, 2 Coll. 465, 10 Jur. 347, S.C. on appeal	
<i>sub nom.</i> Jones v. Matthie, 1847, 11 Jur. 504	665
Maundrell v. Maundrell, 1802, 7 Ves. 566, 10 Ves. 246	677
Maxwell v. Wightwick, 1866, L.R. 3 Eq. 210	627
Mayer v. Murray, 1878, 8 C. D. 424	591
McCabe v. Thompson, 1857, 6 Gr. 175	263
McCarogher v. Whieldon, 1864, 34 Beav. 107	649

McCarthy v. McCartie (no. 2), [1904] 1 L.R. 100	248
McCollum v. Caston, 1901, 1 O.L.R. 240	466
McCormick v. McCormick, 1874, 6 O.P.R. 208	450
McCuag v. Barber, 1898, 29 Can. S.C.R. 126, reversing Barber v. McCuag, 24 O.A.R. 192	242
McCue v. Smith, 1911, 17 W.L.R. 145	53
McDermid v. McDermid, 1870, 7 O.P.R. 457	610
McDermott v. Bielschowsky, 1912, 22 M.R. 319, 3 D.L.R. 319.....	427
McDermott v. Fraser, 1915, 25 M.R. 298, 23 D.L.R. 430	704, 708
McDonald, Re, McDonald & Marsh, 1879, 8 O.P.R. 88	630
McDonald v. Elliott, 1886, 12 O.R. 98	515, 523, 604
McDonald v. Grundy, 1904, 8 O.L.R. 113	523, 526, 652
McDonald v. Hime, 1868, 15 Gr. 72	302
McDonald v. McDonell, 1864, 2 U.C.E. & A. 393	263, 564
McDonald v. McIntosh, 1851, 8 U.C.R. 388	547
McDonald v. McMillan, 1864, 23 U.C.R. 302	280
McDonald v. Pouchen, 1918, 42 O.L.R. 18, 41 D.L.R. 619	237
McDonald v. Reynolds, 1868, 14 Gr. 691	334
McDonald v. Wright, 1866, 12 Gr. 552	436
McDonell v. Building and Loan Association, 1886, 10 O.R. 580..	702
McDonnell v. West, 1868, 14 Gr. 492	600
McDonough v. Dougherty, 1862, 10 Gr. 42	313
McDougall v. Campbell, 1881, 6 Can. S.C.R. 502, affirming Camp- bell v. McDougall, 1880, 5 O.A.R. 503	459, 513
McDougall v. Lindsay Paper Mill Co., 1884, 10 O.P.R. 247	417, 427
McEllister v. Biggs, 1883, 8 App. Cas. 314	178
McFadden v. Brandon, 1904, 8 O.L.R. 610	543
McGregor v. Gaulin, 1848, 4 U.C.R. 378	611
McGregor v. Hemstreet, 1912, 5 D.L.R. 301	458
McIntosh v. Ontario Bank, 1872, 19 Gr. 155	592
McIntyre v. Canada Co., 1871, 18 Gr. 367	547
McIntyre v. Thompson, 1881, 6 O.R. 719	64
McKay v. Clare, Re, 1910, 20 O.L.R. 344	
McKay v. Howard, 1883, 6 O.R. 135	7
McKay v. Hutchings, 1917, 41 O.L.R. 46	27
McKay v. McFarlane, 1872, 19 Gr. 345	381
McKay v. Reed, 1864, 1 U.C. Chy. Ch. 208	633
McKeen v. McKay, 1875, Russ (N.S. Eq.) 121	551
McKenzie v. McLeod, 1909, 39 N.B.R. 230, 4 N.B. Eq. 72	497, 604
McKillop & Benjafield v. Alexander, 1912, 45 Can. S.C.R. 551, 1 D.L.R. 586, affirming Alexander v. Gesman, 1911, 4 S.L.R. 111	185
McKinnon v. Anderson, 1871, 18 Gr. 684	513
McLaren v. Fraser, 1868, 15 Gr. 239	507
McLaren v. Fraser, 1870, 17 Gr. 533	149
McLaren v. Fraser, 1870, 17 Gr. 567	587, 679
McLaren v. Miller, 1874, 20 Gr. 637	611

TABLE OF CASES

Ili

McLaughlin v. Stewart, 1901, 1 O.L.R. 295	427
McLean v. Burton, 1876, 24 Gr. 134	578, 579
McLean v. Wilkins, 1887, 14 Can. S.C.R. 22, reversing Wilkins v. McLean, 13 O.A.R. 467, and restoring 10 O.R. 58 ..	208, 592
McLennan v. McLean, 1879, 27 Gr. 54	311, 312
McLeod v. Avey, 1888, 16 O.R. 365	578, 579
McLeod v. Wodland, 1893, 25 O.R. 118	129
McMahon v. North Kent Ironworks Co., [1891] 2 Ch. 148	688
McMaster v. Hector, 1872, 8 C.L.J. 284	443, 609
McMaster v. Phipps, 1855, 5 Gr. 253	120
McMichael v. Wilkie, 1891, 18 O.A.R. 464	236, 374
McMicken v. Ontario Bank, 1891, 20 Can. S.C.R. 548	51
McMicking v. Gibbons, 1897, 24 O.A.R. 586	529, 530
McMillan, Re, McMillan v. McMillan, 1893, 24 O.R. 181	32
McMillan v. McMillan, 1894, 21 O.A.R. 343, 23 O.R. 351	129
McMillan v. Munro, 1898, 25 O.A.R. 288	126
McMullen v. Free, 1887, 13 O.R. 57	359
McMullen v. Polley, 1886, 12 O.R. 702	501
McMurtry v. Leushner, 1912, 3 O.W.N. 1176, 3 D.L.R. 549	237
McNally v. Anderson, 1914, 31 O.L.R. 561, 19 D.L.R. 775	277
McPhadden v. Bacon, 1867, 13 Gr. 591	316
McPherson v. Dougan, 1862, 9 Gr. 258	199
McPhillips v. London Mutual Fire Insurance Co., 1896, 23 O.A.R. 524	720
McQueen v. Phoenix Mutual Fire Insurance Co., 1880, 4 Can. S.C.R. 660	717
McVean v. Tiffin, 1885, 13 O.A.R. 1	134
McVity v. Tranouth, [1908] A.C. 60, reversing 36 Can. S.C.R. 455, 9 O.L.R. 105	112, 127, 545, 550
Melbourne v. Cottrell, 1857, 29 L.T. 293	618
Melbourne Banking Corporation v. Brougham, 1882, 7 App. Cas. 307	56
Mellersh v. Brown, 1890, 45 Ch.D. 225	528, 604
Mellor v. Lees, 1742, 2 Atk. 494	41
Mellor v. Porter, 1883, 25 Ch.D. 158	419
Mendels v. Gibson, 1905, 9 O.L.R. 94	384, 683
Mennie v. Litch, 1885, 8 O.R. 397	619
Mercantile Bank of London v. Evans, [1899] 2 Q.B. 613	196
Mercer and Moore, In re, 1880, 14 Ch.D. 287	406
Mercer v. Neff, 1898, 29 O.R. 680	32
Merriam v. Cronk, 1874, 21 Gr. 60	591, 593
Merritt v. Stephenson, 1858, 7 Gr. 22	138
Mestaer v. Gillespie, 1805, 11 Ves. 621	75
Metcalfe v. Archbishop of York, 1836, 1 My. & Cr. 547	77
Metropolis and Counties Permanent Investment Building Society, In re, Gatfield's Case, [1911] 1 Ch. 698	558, 566

Metropolitan Amalgamated Estates, In re, Fairweather v. The Company, [1912] 2 Ch. 497	687
Metropolitan Counties, etc., Assurance Society v. Brown, 1859, 4 H. & N. 428	699
Meux v. Jacobs, 1875, L.R. 7 H.L. 481	21
Mewburn v. Mackelcan, 1892, 19 O.A.R. 729	237
Meyers v. Harrison, 1850, 1 Gr. 449	389, 455
Middleton (Lord) v. Elliot, 1847, 15 Sim. 531	497, 610
Middleton v. Scott, 1902, 4 O.L.R. 459	498
Midland Loan and Savings Co. v. Genitti, 1916, 36 O.L.R. 163, 30 D.L.R. 52	730
Mildred v. Austin, 1869, L.R. 8 Eq. 220	505
Miles v. Ankatell, 1898, 25 O.A.R. 458	21
Miles v. New Zealand Alford Estate Co., 1886, 32 Ch.D. 266 ...	35
Millar v. Smith, 1873, 23 U.C.C.P. 47	110, 117, 118
Miller v. Brown, 1883, 3 O.R. 210	146, 623
Miller v. Cook, 1870, L.R. 10 Eq. 641	653
Miller v. Halifax Power Co., 1915, 48 N.S.R. 370, 24 D.L.R. 29...	112
Miller v. Imperial Loan and Investment Co., 1896, 11 M.R. 247...	709
Milburn v. Milburn, 1847, 4 U.C.R. 179	498
Miller v. Tew, 1909, 20 O.L.R. 77	719
Millett v. Davey, 1862, 31 Beav. 470	595
Mills v. Jennings, 1880, 13 Ch.D. 639, affirmed <i>sub nom.</i> Jennings v. Jordan, 1881, 6 App. Cas. 698...136, 141, 143, 412, 659	
Mills v. United Counties Bank, [1912] 1 Ch. 231	234, 235
Milne v. Moore, 1894, 24 O.R. 456	274
Minter v. Carr, [1894] 3 Ch. 498	143
Mitchell v. City of London Assurance Co., 1888, 15 O.A.R. 262	
	373, 717, 718
Mitchell and Fraser, Re, 1917, 40 O.L.R. 389, 38 D.L.R. 597	353
Mitchell v. Kinnear, 1897, 1 N.B. Eq. 427	592, 673
Mitchell v. Saylor, 1901, 1 O.L.R. 453	583
Mitchell-Henry v. Norwich Union Life Insurance Society, [1918] 2 K.B. 67	503
Moffatt v. Thomson, 1851, 3 Gr. 111	282, 412
Molden v. Magneta Time Co., In re the Company, [1915] W.N. 318, 81 L.J. Ch. 814	330
Molphy, Re, Beckes v. Tiernan, 1896, 17 O.P.R. 247	440
Monk v. Benjamin, 1890, 13 O.P.R. 356	414
Monolithic Building Co., In re, Tacon v. The Company, [1915] 1 Ch. 643	128, 176
Montl v. Barnes, [1901] 1 K.B. 205	21
Montreal Trust Co. v. Boggs, 1915, 25 D.L.R. 432	238
Moody v. Matthews, 1801, 7 Ves. 174	91
Moore, Re, 1878, 8 O.P.R. 471	310
Moore v. Gibbon, In re Gibbon, [1909] 1 Ch. 367	267, 341
Moore v. Greg, 1848, 2 Ph. 717	99

TABLE OF CASES

iv

Moore v. Hobson, 1868, 14 Gr. 703	404, 507
Moore and Hulm's Contract, In re, [1912] 2 Ch. 105	86, 303
Moore v. Jackson, 1893, 22 Can. S.C.R. 210	297
Moore v. Painter, 1842, 6 Jur. 903	595
Moore v. Shelley, 1883, 8 App. Cas. 285.....	357, 584, 654
Moore v. Choat, 1839, 8 Sim. 508	90
Moran v. Currie, 1857, 8 U.C.C.P. 60	193
Morgan v. Dominion Permanent Loan Co., 1914, 50 Can. S.C.R. 485, 22 D.L.R. 163	27
Morgan v. Jeffreys, [1910] 1 Ch. 620	490
Morice v. Kernighan, 1908, 18 M.R. 360.....	240
Morland v. Isaac, 1855, 20 Beav. 389	50
Morley v. Morley, 1858, 25 Beav. 253	192
Morrell and Chapman's Contract, In re, [1915] 1 Ch. 162	670
Morrison, In re, Jones v. Taylor, Cooke v. Morrison, [1914] 1 Ch. 50	23, 95
Morrison v. Robinson, 1872, 19 Gr. 480	434
Morrow v. Lancashire Insurance Co., 1899, 26 O.A.R. 173	720
Morton v. Woods, 1869, L.R. 4 Q.B. 293, L.R. 3 Q.B. 658	698, 699
Moss, In re, Levy v. Sewill, 1885, 31 Ch.D. 90.....	494, 606
Moss v. Gallimore, 1779, Doug 279, 18 RC 403	250, 252, 354, 357
Mountford v. Scott, 1823, Turn. & R. 274.....	80
Mowers Trusts, In re, 1869, L.R. 8 Eq. 110	248
Muchall v. Banks, 1862, 10 Gr. 25	231
Muller v. Schwalbe, Re Royal Bank and Banque d'Hochelaga, 1914, 8 A.L.R. 125, 19 D.L.R. 19	185
Mumford v. Collier, 1890, 25 Q.B.D. 279	704
Munro v. Waller, 1896, 28 O.R. 29	89
Munsen v. Hauss, 1875, 22 Gr. 279	384, 394, 454
Murchie v. Theriault, 1898, 1 N.B. Eq. 588	114
Murray v. Watkins, 1890, 62 L.T. 796	554
Music Hall Block, In re, Dumble v. McIntosh, 1884, 8 O.R. 225 280, 310	
Muttlebury v. Stevens, 1873 O.R. 29	603, 604
Muttlebury v. Taylor, 1891 O.R. 312	333, 334
Mutual Life Assurance Co. v. Douglas, 1918, 57 Can. S.C.R. 243, 44 D.L.R. 115, reversing Douglas v. Mutual Life Assurance Co., 1918, 13 A.L.R. 18, 38 D.L.R. 459, 39 D.L.R. 601.....	161, 470, 485
Nanny v. Edwards, 1827, 4 Russ, 124	451
Nant-y-glo and Blaia Ironworks Co. v. Tamplin, 1876, 35 L.T. 125	205
National Bank of Australasia v. United Hand-in-Hand and Bank of Hope Co., 1879, 4 App. Cas. 391..589, 623, 624, 666, 669, 673	
National Fire Insurance Co. v. McLaren, 1886, 12 O.R. 682.....	725

National Mercantile Bank Ex parte, In re Phillips, 1880, 16 Ch.D. 104	577
National Mercantile Bank v. Hampson, 1880, 5 Q.B.D. 177	577
National Provincial Bank of England v. Games, 1886, 31 Ch.D. 582	617, 619, 620
National Trust Co. v. Campbell, 1908, 17 M. R. 587, 378, 379, 446, 484	
National Trust Co. v. Trusts and Guarantee Co., 1912, 26 O.L.R. 279	84
Neel v. Almond, 1897, 29 O.R. 63	524
Nelson v. Booth, 1857, 3 DeG. & J. 119	596
Nelson v. Cochrane, 1889, 13 O.P.R. 76	402
Nelson v. Page, 1868, L.R. 7 Eq. 25	273
Nesbitt v. Rice, 1864, 14 U.C.C.P. 409	632
Nesbitt v. Tridennick, 1808, 1 Ball & B. 29	92
Neve v. Pennell, Hunt v. Neve, 1863, 2 Hem. & M. 170	138
Neveren v. Wright, 1917, 39 O.L.R. 397, 36 D.L.R. 734	194, 197
Nevitt v. McMurray, 1886, 14 O.A.R. 126	126
New, In re, Ex parte Farley, 1841, 1 Mont. D. & DeG. 683	80
New Brunswick Ry. Co. v. Kelley, 1896, 26 Can. S.C.R. 341, 33 N.B.R. 310	110
Newcomb v. Bonham, 1681, 1 Vern. 7	491
Newman v. Selfe, 1861, 33 Beav. 522	460
Newmarch, In re, Newmarch v. Storr, 1878, 9 Ch.D. 12	273
Nicholl v. Allenby, 1889, 17 O.R. 275	428
Nicholls v. Maynard, 1747, 3 Atk. 519, 18 R.C. 141	606
Nichols v. Watson, 1876, 23 Gr. 606	233
Nickle and Town of Walkerton, In re, 1886, 11 O.R. 433	359
Nioa v. Bell, 1901, 27 V.L.R. 82	198
Nisbet & Potts' Contract, In re, [1905] 1 Ch. 391	102
Noakes & Co. v. Rice, [1902] A.C. 24	6, 44, 45, 46, 48
Noble v. Campbell, 1911, 21 M.R. 597	237, 485
Noble v. Noble, 1912, 27 O.L.R. 342, 9 D.L.R. 735	308, 544
Norrish v. Marshall, 1821, 5 Madd. 475	198, 201
North British and Mercantile Insurance Co. v. London, etc. Co., 1877, 5 Ch.D. 569	726
North of Scotland Mortgage Co. v. German, 1880, 31 U.C.C.P. 349	339
North of Scotland Mortgage Co. v. Uddell, 1882, 46 U.C.R. 511	56, 339
Northampton (Marquess of) v. Pollock, 1890, 45 Ch.D. 190, [1892] A.C. 1	45
Northern Counties of England Fire Insurance Co. v. Whipp, 1881, 26 Ch.D. 482, 10 R.C. 507	96
Northern Trusts Co. v. Battell, 1916, 9 S.L.R. 103, 29 D.L.R. 515	132
Nottingham Permanent Benefit Society v. Thurston, [1905] A.C. 6, [1902] 1 Ch. 1	24
Noy v. Ellis, 1676, 2 Cas. in Ch. 220	216
Noyes v. Pollock, 1886, 32 Ch.D. 53	245, 580, 581

TABLE OF CASES

lvii

Nugent v. Nugent, [1908] 1 Ch. 546	674
Nutt v. Easton, [1900] 1 Ch. 29	674
Ocean Accident and Guarantee Corporation v. Ilford Gas Co.,	
[1905] 2 K.B. 493	256, 351, 360
O'Connor v. Charleson, 1916, 10 O.W.N. 35	749
Odell v. Bennett, 1889, 13 O.P.R. 10	418
O'Donohoe, Re, 1868, 4 O.P.R. 266	630
O'Donohoe v. Whitty, 1882, 2 O.R. 424, affirmed, 20 C.L.J. 146..	660
O'Donohue v. Hembroff, 1873 9 U.C.L.J. 312	440
Oland v. McNeil, 1902, 32 Can. S.C.R. 23, 34 N.S.R. 453	53, 654
Oliver v. Hinton, [1899] 2 Ch. 264	97, 99
Oliver v. McLaughlin, 1893, 24 O.R. 41	236
Omnium Securities Co. v. Canada Fire and Mutual Insurance	
Co., 1882, 1 O.R. 494	723
Onslow v. Wallis, 1849, 1 Mac. & G. 506	267
Orde v. Heming, 1686, 1 Vern. 418.....	5
Orford (Municipality) v. Bayley, 1868, 1 Chy Ch. (Ont.) 272 ...	402
Orme v. Wright, 1839, 3 Jur. 19.....	674
Orser v. Colonial Investment and Loan Co., 1917, 10 S.L.R. 349,	
37 D.L.R. 47	485
Otter v. Lord Vaux, 1856, 6 DeG. M. & G. 638, 2 K. & J. 650..	339, 675
Owen, In re, [1894] 3 Ch. 220	389, 390, 524
Owen v. Crouch, 1857, 5 W.R. 545	621
Oxley v. Culton, 1899, 32 N.S.R. 256	120, 124
Paget v. Ede, 1874, L.R. 18 Eq. 118	54, 392, 487
Palmer v. Earl of Carlyle, 1823, 1 Sim. & St. 423, 18 R.C. 491....	399
Palmer v. Hendrie, 1859, 27 Beav. 349	384, 454
Palmer v. McKnight, 1899, 31 O.R. 306.....	239
Palmer v. Winstanley, 1874, 23 U.C.C.P. 586	501, 502
Pambrun and Short, Re, 1914, 7 A.L.R. 314, 16 D.L.R. 193.....	496
Panama, New Zealand, and Australian Royal Mail Co., In re,	
1870, L.R. 5 Ch. 318	82
Pannell v. Hurley, 1845, 2 Coll. 241	406
Parbola, In re, Blackburn v. Parbola, [1909] 2 Ch. 437	429
Parke v. Riley, 1866, 3 U.C.E. & A. 215	211
Parker, In re, Parker v. Parker, 1894, 24 O.R. 373	492, 614
Parker v. Calcraft, 1821, 6 Madd. 11	352
Parker v. Housefield, 1834, 2 My & K. 419, 18 R.C. 497	418
Parker v. Vine Growers' Association, 1876, 23 Gr. 179	390
Parker v. Watkins, 1859, John. 133	621
Parker v. Willett, 1889, 22 N.S.R. 83	412
Parkinson v. Hanbury, 1867, L.R. 2 H.L. 1, 18 R.C. 411	
	581, 591, 657, 675
Parr v. Montgomery, 1880, 27 Gr. 521	264
Parsons v. Bank of Montreal, 1868, 15 Gr. 411	504

Parsons v. Queen Insurance Co., 1878, 29 U.C.C.P. 188	712
Patch v. Ward, 1867, L.R. 3 Ch. 203	451, 453
Patchell v. Colonial Investment and Loan Co., 1907, 3 N.B. Eq. 129	621
Pateron v. Holland, 1860, 8 Gr. 238	402
Patman v. Harland, 1881, 17 Ch.D. 553, 21 R.C. 752	99
Paton v. Wilkes, 1860, 8 Gr. 252	390
Patrick, In re, Bills v. Tatham, [1891] 1 Ch. 82	192
Patrick v. Walbourne, 1896, 27 O.R. 221	20, 132
Patterson v. Dart, 1911, 24 O.L.R. 609	587, 611
Patterson v. Gilbert, 1888, 12 O.P.R. 652	440
Patterson v. McLean, 1891, 21 O.R. 221	200, 206
Patterson v. Tanner, 1892, 22 O.R. 364	236, 672
Paul v. Johnson, 1866, 12 Gr. 474	585, 586, 589
Pawby v. Colyer, Colyer v. Colyer, 3 DeG. J. & Sm. 676	325
Paxton v. Smith, 1889, 18 O.R. 178	521
Pearce v. Marsh, In re Loveridge, [1904] 1 Ch. 518	216, 525
Pearce v. Morris, 1869, L.R. 5 Ch. 227	505
Pearman v. Hyland, 1862, 22 U.C.R. 202	208
Pearson v. Benson, 1860, 28 Beav. 598	653
Pease v. Fletcher, 1875, 1 Ch.D. 273	689
Peck v. Sun Life Assurance Co., 1905, 11 B.C.R. 215	198
Pebles v. Hyslop, 1914, 30 O.L.R. 511, 19 D.L.R. 654	110, 118, 119
Peers v. Allen, 1872, 19 Gr. 98	429, 490
Peers v. Cooley, 1852, 15 Beav. 209	620
Pegg v. Independent Order of Foresters, 1901, 1 O.L.R. 97	700
Pegg v. Hobson, 1887, 14 O.R. 272	383, 683
Pegg v. Wisden, 1852, 16 Beav. 239	51
Pegge v. Metcalfe, 1856, 5 Gr. 628	264
Pelly v. Wathen, 1851, 1 DeG. M. & G. 16	138
Penn v. Lockwood, 1850, 1 Gr. 547	434, 593
Penn v. Lord Baltimore, 1750, 1 Ves. Sen. 444, 1 W. & T.L.C. Eq. 800	391, 489
Penner v. Canniff, 1868, 1 Ch. Ch. (Ont.) 351	402
Penrhyn (Lord) v. Hughes, 1799, 5 Ves. 99	388
People's Loan and Deposit Co. v. Grant, 1890, 18 Can. S.C.R. 262	603, 604, 605
Perry v. Perry, 1881, 10 O.P.R. 275	664
Perry v. Walker, 1855, 21 L.J. Ch. 319	594
Petkin v. McFarlane, 1881, 9 O.A.R. 429, 13 Can. S.C.R. 677	118, 121
Peto v. Hammond, 1860, 29 Beav. 91	407
Portie v. Hunter, 1884, 10 O.A.R. 127	243
Phillips, In re, Ex parte National Mercantile Bank, 1880, 16 Ch.D. 104	577
Phillips v. Gutteridge, 1859, 4 DeG. & J. 531	341
Phillips v. Hanna, Re, 1902, 3 O.L.R. 558	371, 600
Phillips v. Phillips, 1862, 4 DeG. F. & J. 208, 10 R.C. 533	94, 100

TABLE OF CASES

lix

Phillips v. Prout, 1898, 12 M.R. 143	45
Phillips v. Vaughan, 1685, 1 Vern. 335	201
Pierce v. Canada Permanent Loan Co., 1894, 23 O.A.R. 516, 25 O.R. 671.....	123, 148
Pierce v. Canavan, 1882, 7 O.A.R. 187.....	248
Pilcher v. Rawlins, 1872, L.R. 7 Ch. 259, 21 R.C. 728	97, 102, 103
Pile v. Pile, 1875, 23 W.R. 440	150
Pinhey v. Mercantile Fire Insurance Co., 1901, 2 O.L.R. 296...	712
Pipe v. Shafer, 1868, 1 Chy. Ch. (Ont.) 251	590
Pitman & Edwards, Ex parte, In re Hamilton's Windsor Iron- works, 1879, 12 Ch.D. 707	84
Pitt v. Cholmondeley, 1754, 2 Ves. Sen. 65	574
Platt v. Ashbridge, 1865, 12 Gr. 105	453
Platt v. Grand Trunk Ry. Co., 1886, 12 O.R. 119	359
Platt v. Mendel, 1884, 27 Ch.D. 246.....	339, 437
Pledge v. White, [1896] A.C. 187, 18 R.C. 264....	137, 139, 141, 143, 148
Plenderleith v. Parsons, 1907, 14 O.L.R. 619	602, 626
Plenderleith v. Smith, 1905, 10 O.L.R. 188	268, 399, 409
Plumpton v. Burkinshaw, [1908] 2 K.B. 572	693
Polglass v. Oliver, 1831, 2 Cr. & J. 15.....	498
Pollard, Ex parte, 1840, Mont. & Ch. 239	391
Poltimore v. Quicke, In re Quicke's Trusts, [1908] 1 Ch. 887....	727
Pope, In re, 1886, 17 Q.B.D. 743, 10 R.C. 592	689
Pope v. Biggs, 1829, 9 B. & C. 245	256
Pope v. Onslow, 1692, 2 Vern. 286	137, 142
Popple v. Sylvester, 1882, 22 Ch.D. 98	603, 605
Portman v. Paul, 1864, 10 Gr. 458	403
Potter v. Edwards, 1857, 26 L.J. Ch. 468	45
Pottruff v. Tweedle (not reported)	646
Poulett v. Hill, [1893] 1 Ch. 277	367, 396
Powell v. Brodhurst, [1901] 2 Ch. 160	500
Powell v. London and Provincial Bank, [1893] 1 Ch. 610	104
Powell v. Peck, 1888, 15 O.A.R. 138	604, 605, 695
Powers, In re, Lindsell v. Phillips, 1885, 30 Ch.D. 291	523
Powney v. Blomberg, 1844, 14 Sim. 179.....	498
Pratt v. Bunnell, 1891, 21 O.R. 1	285, 287
Pratt v. Hawkins, 1846, 15 M. & W. 399	550
Pressey v. Trotter, 1878, 26 Gr. 154	201
Preston v. Neale, 1879, 12 Ch.D. 760	50
Preston v. Tunbridge Wells Opera House, [1903] 2 Ch. 323....	687
Pringle v. Hutson, 1909, 19 O.L.R. 652	196, 603, 611
Pritt v. Connecticut Fire Insurance Co., 1896, 23 O.A.R. 449..	720
Prout v. Cock, [1896] 2 Ch. 808	504
Prytherch, In re, Prytherch v. Williams, 1889, 42 Ch.D. 590 ...	507, 589, 687, 689
Public Trustee v. Lawrence, [1912] 1 Ch. 789	257

Pugh v. Heath, 1882, 7 App. Cas. 235, 16 R.C. 389, affirming.	
Heath v. Pugh, 1881, 6 Q.B.D. 345, 16 R.C. 376	353, 358, 449, 536, 552, 561
Punnett, Ex parte, In re Kitchen, 1880, 16 Ch.D. 226.....	20, 699, 700
Purdom v. Pavey, 1896, 26 Can. S.C.R. 412, reversing 23 O.A.R. 9..	489
Purdy v. Parks, 1883, 9 O.P.R. 424	421
Quarrell v. Beckford, 1816, 1 Madd. 269	609, 692
Queen's College v. Claxton, 1894, 25 O.R. 282	328, 332, 625
Queen's Hotel, In re, [1900] 1 Ch. 792	626
Queensland Trustees v. Registrar of Titles, 1893, 5 Q.L.J. 46	168
Quicke's Trusts, In re, Poltimore v. Quicke, [1908] 1 Ch. 887..	727
Raffety v. King, 1836, 1 Keen 601.....	562
Raggett, In re, Ex parte Williams, 1880, 16 Ch.D. 117.....	141
Rakestraw v. Brewer, 1728, 2 P. Wms. 510, Sel. Cas. in Ch. 55	92, 564
Ramsden v. Langley, 1706, 2 Vern. 536.....	621
Ramus v. Dow, 1893, 15 O.P.R. 219.....	410
Ranney v. Stirrett, 1911, 4 S.L.R. 179	170
Rapson v. Hersee, 1869, 16 Gr. 685.....	52
Rathbun v. Culbertson, 1875, 22 Gr. 465.....	262
Rayeraft, Re, 20 O.L.R. 437.....	219
Real Estate Investment Co. v. Metropolitan Building Society, 1883, 3 O.R. 476.....	206
Real Estate Loan Co. v. Guardhouse, Re, 1898, 29 O.R. 602.....	371
Real Estate Loan Co. v. Molesworth, 1886, 3 M.R. 116.....	415
Reddick v. Traders Bank of Canada, 1892, 22 O.R. 449.....	574, 682
Reed, In re, Ex parte Brown, 1878, 9 Ch.D. 389.....	669
Reed v. Wilson, Re, 1893, 23 O.R. 552.....	115
Rees v. Metropolitan Board of Works, 1880, 14 Ch.D. 372.....	617
Reeve, In re, 1867, 4 O.P.R. 27.....	353
Reeve v. Attorney-General, 1741, 2 Atk. 223.....	392
Reeve v. Lisle, [1902] A.C. 401.....	56
Reeves v. Konschur, 1909, 2 S.L.R. 125.....	149, 343
Reid v. Wilson, 1881, 9 O.P.R. 166.....	600
Reinhardt v. Shutt, 1888, 15 O.R. 325.....	131, 404, 428
Rendall v. Darby, In re Darby's Estate, [1907] 2 Ch. 465.....	243, 246
Rennie v. Quebec Bank, 1901, 1 O.L.R. 303.....	196
Renwick v. Berryman, 1886, 3 M.R. 387.....	244
Repington, In re, Wodehouse v. Scobell, [1904] 1 Ch. 811.....	246
Reynolds v. Allan, 1852, 10 U.C.R. 350.....	498
Reynolds v. Ashby & Son, [1904] A.C. 466.....	21, 23
Reynolds v. Foster, 1912, 3 D.L.R. 506, 3 O.W.N. 983.....	81
Rice v. George, 1872, 19 Gr. 174.....	587, 589
Rice v. Murray, 1881, 2 M.R. 37	437
Rice v. Rice, 1854, 2 Drew 73, 10 R.C. 507	85

TABLE OF CASES

lxi

Richards v. Cooper, 1842, 5 Beav. 304.....	388
Richards v. Morgan, 1753, 4 W. & C. Ex. 570 (appendix)	594
Richards v. Thompson, 1911, 4 S.L.R. 213.....	474
Richardson, In re, Ex parte Governors of St. Thomas's Hos- pital, [1911] 2 K.B. 705.....	237
Richardson v. Horton, 1843, 7 Beav. 112.....	150
Richardson v. Jackson, 1897, 34 N.B.R. 301.....	611
Richardson v. Langridge, 1811, 4 Taunt. 128, 25 R.C. 3.....	353
Richardson v. Younge, 1871, L.R. 6 Ch. 478, L.R. 10 Eq. 275 566, 567, 568	
Richmond v. Evans, 1861, 8 Gr. 508.....	668
Ridout, In re, 1853, 2 U.C.C.P. 477.....	306
Rigney v. Fuller, 1853, 4 Gr. 198.....	460
Ritchie, Re, Sewery v. Ritchie, 1876, 23 Gr. 66.....	440
Roach v. McLachlan, 1892, 19 O.A.R. 496.....	124
Robert v. Caughell, 1903, 6 O.L.R. 381.....	463
Roberts, In re, 1880, 14 Ch.D. 49.....	604
Roberts v. Croft, 1857, 2 DeG. & J. 1.....	79
Re Robertson, 1876, 24 Gr. 442.....	286
Robertson, Re, Robertson v. Robertson, 1878, 25 Gr. 276, 486 282, 286	
Robertson v. Burrill, 1895, 22 O.A.R. 356.....	520
Robertson v. Lockie, 1846, 15 Sim. 285.....	659
Robertson v. Norris, 1858, 1 Giff. 421.....	673
Robin Hood Mills v. Harrison, 1918, 40 D.L.R. 328.....	170
Robinson's Settlement, In re, Gant v. Hobbs, [1912] 1 Ch. 717..	370
Robinson v. Chisholm, 1894, 27 N.S.R. 74.....	52
Robinson v. Dobson, 1865, 11 Gr. 357.....	421
Robinson v. Ford, 1914, 7 S.L.R. 143, 14 D.L.R. 360.....	177
Robinson v. Moffatt, 1916, 37 O.L.R. 42, 25 D.L.R. 462.....	171
Robinson v. Trevor, 1883, 12 Q.B.D. 423.....	312
Robock v. Tetters, 1900, 13 M.R. 124.....	181
Robson v. Argue, 1878, 25 Gr. 407.....	429
Rochevoucault v. Boustead, [1897] 1 Ch. 196.....	52
Rodburn v. Swinney, 1889, 16 Can. S.C.R. 297.....	648
Roddam v. Morley, 1857, 1 DeG. & J. 1, 16 R.C. 273.....	520, 521
Roe v. Braden, 1877, 24 Gr. 589.....	119, 127
Rogers, In re, Ex parte Challinor, 1880, 16 Ch.D. 260.....	618
Rogers' Trusts, In re, 1860, 1 Dr. & S. 338.....	608
Rogers v. Challis, 1859, 27 Beav. 175, 18 R.C. 278.....	80, 618
Rogers v. Dickson, 1861, 10 U.C.C.P. 481.....	359
Rogers v. Humphreys, 1835, 4 A. & E. 299.....	250, 252
Rogers v. Lewis, 1866, 12 Gr. 257.....	404, 507
Rogers v. Ontario Bank, 1891, 21 O.R. 416.....	21
Rogers v. Wilson, 1887, 12 O.P.R. 322, 545.....	331
Rolfe v. Chester, 1855, 20 Beav. 610.....	149, 150
Rolland v. Hart, 1871, L.R. 6 Ch. 678.....	100, 122

Rolterson v. Olson and the Mutual Life Assurance Co., 1915	
S.L.R. 143, 21 D.L.P., 671.....	365, 685
Rolph, Ex parte, In re Spindler, 1881, 19 O.D. 98.....	618
Rooker v. Hootsiter, 1896, 26 Can. S.C.R. 41, 22 O.A.R. 175	
.....	7, 111
Roscoe v. McCoinch, 1913, 29 D.L.R. 121, 25 O.P.R. 121.....	121
Rose v. Page, 1829, 2 S.M. 471.....	471
Rose v. Peterkin, 1885, 13 Can. S.C.R. 577, 9 O.A.R. 118, 118, 121	
Rouchbach v. Parry, 1879, 27 Gr. 15.....	41
Ross & Co. v. Ross, 1904, 7 O.L.R. 31.....	31
Ross v. Ross, 1882, 7 Can. S.C.R. 100.....	100
Ross v. Ross, 1892, 23 O.R. 43.....	43
Scott, 187, 21 Gr. 391, 22 Gr. 29.....	29
St. John, 1877, 7 O.P.R. 126.....	126, 138, 141
Ross v. Schmitz, 1913, 6 S.L.R. 131, 14 D.L.R. 618	
.....	237, 527, 51
Rossiter, In re, Rossiter v. Rossiter, 1879, 13 Ch.D. 355.....	27
Rourke v. Robinson, 1911, 1 Ch. 180.....	301, 496, 497
Rowland v. Burwell, 1888, 12 O.P.R. 607.....	41
Roxburgh v. Cox, 1881, 15 Ch.D. 520.....	20
Royal Bank and Banque d'Hochelaga, Re, Moller v. Schwab	
1914, 8 A.L.R. 125, 19 D.L.R. 19.....	85
Royal Canadian Bank v. Bly, 1869, 22 U.C.C.P. 279, 14 C.L.J.	
reversing 19 U.C.C.P. 196, 20 U.C.C.P. 429.....	429
Rudge v. Richards, 1873, L.R. 8 C.P. 358.....	38
Rumble v. Moore, 1868, 1 Ch. Ch. (Ont.) 59.....	59
Rumely and Registrar, S.L.R.D., In re, 1911, 4 S.L.R. 100.....	100
Rumney and Smith, In re, [1897] 2 Ch. 351.....	61
Rumsey v. Thompson, 1869, 8 Gr. 372.....	421
Rusden v. Pope, 1868, L.R. 3 Ex. 269.....	256
Rushworth's Case, 1676, Freem. Ch. 13.....	92
Russ v. Mills, 1879, 7 Gr. 145.....	778
Russell v. Russell, 1783, 1 Bro. C.C. 269..... & T.L.C.	
S.R.C. 20.....	20
Russell v. Robertson, 1859, 1 U.C. Chy. 100.....	100
Russell v. Russell, 1881, 28 Gr. 419.....	419
Russell v. Smithies, 1792, 1 Anst. 96, 91.....	91
Rutherford v. Mitchell, 1904, 15 M.R. 39.....	39
Rutherford v. Rutherford, 1896, 17 O.L.R. 100.....	100
S. Re, 1907, 14 O.P.R. 720.....	720
Stoller v. Worley, [1894] 2 Ch. 170.....	74, 388, 389, 391, 470
St. John v. Ryker, 1884, 10 Can. S.C.R. 278.....	602, 603
St. Thomas's Hospital, Ex parte Governors of, In re Richard	
1911, 4 K.B. 705.....	237
Statute of Mortgage, mis. by Private Contract.....	5
W.W.R.	479

TABLE OF CASES

Salmon v. Denn, 1851, 3 Mac. & G. 144.....	201, 252
Sloway v. Strawbridge, 1885, 1 K. & J. 371, 7 DeG. M. & G. 594..	648
St. v. M. Duchess of Northampton, [1892] A.C. 1.....	39, 41, 45, 50, 606, 611
Silver v. The Company, In re Leas Hotel Co., [1902] 1 Ch.....	690
Metcalf, 1910, 10 M.R. 456.....	474
St. Ireland, 1879, 4 O.A.R. 118.....	260, 262, 263, 265
St. v. Pattison, 1812, 1 Har. 533.....	389
St. Jarrah Timber and Wood Paving Corporation, [1904] A.C. 323.....	33, 46, 48
Allen & Sons, In re, [1] 1 Ch. 575.....	23, 94
John & Sons v. Brock, [7] 2 Ch. 533....	537, 544, 559
v. S. 1881, 19 Ch.D. 373.....	547, 567
son v. 1859, 7 Gr. 382.....	658
on v. H. 1843, 6 Beav. 246.....	585, 62
Sands v. Standard Insurance, 1879, 26 Gr. 113, 27 Gr. 167....	713
Sands v. Thomson, 1883, 22 Ch.D. 614.....	556
Sangster v. Cochran, 1884, 28 Ch.D. 298.....	313
Sanguinetti v. Stuckey's Bank Co., [1896] 1 Ch. 502.....	417
Santley v. Wilde, [1899] 2 Ch. 471 reversing [1899] 1 Ch. 747....	6, 45, 652
Sargent v. Read, 1876, 1 Ch. 1.....	689
Sargent, Ex parte, In re The London Co., 1874, L.R. 17 Eq. 273 191	
Saunders v. Milson, 180.....	573..... 81
Savile v. Drax, In re Drax.....	Ch. 781..... 599
Sawyer v. Robertson, 190.....	72..... 366, 396
Sawyer and Massey v. Wadd.....	N.W.T.L.R. 45..... 76
Searlett v. Birney, 1893, 15 O.....	164
Schlosser v. Colonial Investment.....	1916, S.L.R. 382..... 172
Scholefield v. Lockwood, 1863, 11 W.R. 555.....	575
Schwartz v. Williams, 1915, 35 O.L.R. 33, 27 D.L.R. 733, 378, 382 496	
Selater v. Cottam, 1857, 3 Jur. N.S. 630.....	629
Seoble v. Collins, [1895] 1 Q.B. 375.....	705
Scott v. Crinnlan, 1918, 43 O.L.R. 430, 44 D.L.R. 20.....	730
Scott v. Morley, 1887, 20 Q.B.D. 120.....	374
Scott v. Supple, 1893, 23 O.R. 393.....	269, 273
Scott v. Swanson, 1907, 39 Can. S.C.R. 229, Affirming Federal Life Assurance Co. v. Stinson, 1906, 13 O.L.R. 147.....	148, 442
Scott v. Vosburg, 1880, 8 O.P.R. 336.....	578
Scottish American Investment Co. v. Brewer, 1901, 2 O.L.R. 369....	452
Scottish American Investment Co. v. Pringle, 1893, 20 O.A.R. 398....	
Scottish American Investment Co. v. Tennant, 1890, 19 O.R. 263....	139
Scottish Temperance Life Assurance Co. v. District Registrar of Titles, 1917, 24 B.C.R. 232, 36 D.L.R. 152.....	485
Scully v. Robertson, 1894, 30 C.L.J. 472.....	501
Scully v. Tracy, In re Tracy, 1894, 21 O.A.R. 454.....	501

Searle v. Choat, 1884, 25 Ch.D. 723.....	688
Searles v. Sadgrave, 1855, 5 E. & B. 639.....	498
Security Lumber Co. v. Duplat, 1916, 9 S.L.R. 318, 29 D.L.R. 460.....	132
Seear v. Lawson, 1880, 15 Ch.D. 426.....	231
Seeley v. Caldwell, 1908, 18 O.L.R. 472.....	24
Selby v. Pomfret, 1861, 3 DeG. F. & J. 595.....	139, 143
Selwyn v. Garfit, 1888, 38 Ch.D. 273.....	650, 659
Senhouse v. Earl, 1752, 2 Ves. Sen. 449.....	449
Sewery v. Ritchie, Re Ritchie, 1876, 23 Gr. 66.....	440
Sharp v. Rickards, [1909] 1 Ch. 109.....	140
Sharpe v. Foy, 1868, L.R. 4 Ch. 35.....	100
Shaver v. Sproule, 1913, 4 O.W.N. 968, 9 D.L.R. 641.....	237
Shaw v. Bailey, 1907, 17 M.R. 97.....	177
Shaw v. Bunny, 1865, 2 DeG. J. & S. 468.....	675
Shaw v. Coulter, 1905, 11 O.L.R. 630.....	567
Shaw v. Foster, 1872, L.R. 5 H.L. 340.....	79
Sheffield Union Banking Co., Ex parte, In re Carter and Justins, 1865, 13 L.T. 477.....	78
Shepard v. Jones, 1882, 21 Ch.D. 469.....	574, 585, 589
Shepard and Rosevear and Moyes Chemical Co., Re, 1918, 42 O.L.R. 184.....	742, 747
Shields v. Shields, 1918, 43 O.L.R. 117.....	662
Shore, Re, 1890, 6 M.R. 305.....	667
Shore v. Green, 1890, 6 M.R. 322.....	178
Short v. Graham, 1908, 7 W.L.R. 787.....	53, 239
Snotbolt, Re, 1888, 1 B.C.R. part 2, 337.....	152
Shove v. Pincke, 1793, 5 T.R. 124.....	9
Shuttleworth v. Laycock, 1684, 1 Vern. 244.....	137
Sichel v. Mosenthal, 1862, 30 Beav. 371, 18 R.C. 282.....	80, 618
Stemens v. Dirks, 1913, 23 M.R. 581, 14 D.L.R. 149.....	117
Silverthorn v. Glazebrook, 1899, 30 O.R. 408.....	138, 407
Simonton v. Graham, 1881, 8 O.P.R. 495.....	604
Simpson v. Dolan, 1908, 16 O.L.R. 459.....	243
Simpson v. Horne, 1880, 28 Gr. 1.....	626
Simpson v. Smyth, 1846-7, 1 U.C.E. & A. 9, 172, <i>sub nom.</i> Smyth v. Simpson, 1859, 7 Moo. P.C. 205, 5 Gr. 104 58, 59, 60, 61, 505	
Simpson, 1859, 7 Mos. P.C. 205, 5 Gr. 104.....	58, 59, 60, 61, 505
Sinnott v. Bowden, [1912] 2 Ch. 414.....	727
Skæe v. Chapman, 1874, 21 Gr. 534.....	488
Skelton v. London and North Western Ry. Co., 1867, L.R. 2 C.P. 631.....	716
Slade v. Rigg, 1843, 3 Hare 35.....	388
Small v. Thompson, 1897, 28 Can. S.C.R. 219.....	236
Smart v. McEwan, 1871, 18 Gr. 623.....	203
Smith, Ex parte, In re Hildyard, 1842, 2 Mont. D. & DeG. 587..	208
Smith, H. re, Hannington v. True, Giles v. True, 1886, 33 Ch.D. 195.....	273

TABLE OF CASES

LXV

Smith, <i>In re</i> , Lawrence v. Kitson, [1916] 2 Ch. 206.....	75
Smith v. Beal, 1894, 25 O.R. 368.....	620
Smith v. Brown, 1890, 20 O.R. 165.....	523, 665
Smith v. Chichester, 1842, 2 Dr. & W. 393, 18 R.C. 128, 1 Conn. & Law 486.....	19, 91
Smith v. Columbia Insurance Co., 1851, 17 Penn. 253.....	725
Smith v. Darling, 1917, 55 Can. S.C.R. 82, 36 D.L.R. 1, affirming 36 O.L.R. 587, 32 D.L.R. 307.....	505, 535, 560, 561
Smith v. Eggington, 1874, L.R. 9 C.P. 145.....	256
Sovereign Fire Insurance Co. v. Peters, 1885, 12 Can. S.C.R. 33..	713
Smith v. Green, 1844, 1 Coll. 234.....	325
Smith v. Hall, 1878, 9 Ch.D. 143.....	528
Smith v. Hunt, 1901, 2 O.L.R. 134, 4 O.L.R. 653.....	507
Smith v. Lloyd, 1854, 9 Exch. 562, 16 R.C. 328.....	537
Smith v. National Trust Co., 1912, 45 Can. S.C.R. 618, 1 D.L.R. 698, affirming 20 M.R. 522.....	155, 161, 185, 187, 190, 194, 467, 469, 571, 685
Smith v. Pears, 1897, 24 O.A.R. 82.....	240, 241
Smith v. Smith, 1835, 1 Y. & C. Ex. 338.....	77
Smith v. Smith, 1852, 3 Gr. 451.....	282
Smith v. Smith, [1891] 13 Ch. 550, 18 R.C. 119.....	493
Smith v. Spears, 1892, 22 O.R. 286.....	670, 671
Smith v. Watts, <i>In re</i> Watts, 1882, 22 Ch.D. 5.....	624
Smithett v. Hesketh, 1890, 44 Ch.D. 161.....	330, 437
Smyth v. Martin, 1898, 18 O.P.R. 227.....	416
Smyth v. Simpson, 1859, 7 Moo. P.C. 205, 5 Gr. 104, affirming Simpson v. Smyth, 1846-7, 1 U.C.E. & A. 9, 172.....	58, 59, 60, 61, 505
Sneyd, <i>In re</i> , Ex parte Fewings, 1883, 25 Ch.D. 338.....	605, 618, 619
Solomon and Meagher's Contract, <i>In re</i> , 1889, 40 Ch.D. 508.....	81, 677
South of England Dairies v. Baker, [1906] 2 Ch. 631.....	90
Sovereign Bank v. International Portland Cement Co., 1907, 14 O.L.R. 511.....	196
Sparks v. Redhead, Cameron v. McRae, 1852, 3 Gr. 311.....	389
Spindler, <i>In re</i> , Ex parte Rolph, 1881, 19 Ch.D. 98.....	618
Spooner v. Sandilands, 1842, 1 Y. & C. Ch. Cas. 390.....	76
Squire v. Pardoe, 1891, 66 L.T. 243.....	624
Stack v. Eaton, 1902, 4 O.L.R. 335.....	21
Stamford, Spalding and Boston Banking Co. v. Smith, [1892] 1 Q.B. 765, 16 R.C. 165.....	520
Standard Realty Co. v. Nicholson, 1911, 24 O.L.R. 46.....	285, 413, 415, 506
Standard Reliance Mortgage Corporation v. Stubbs, 1917, 55 Can. S.C.R. 422, 38 D.L.R. 435, reversing 27 M.R. 276, 32 D.L.R. 57.....	601
Standard Trusts Co. v. Hurst, 1914, 24 M.R. 185, 16 D.L.R. 473..	608
Stanfield v. Hobson, 1852, 3 D.G. M. & G. 620, affirming 16 Beav. 236.....	567

Stanhope v. Manners, 1763, 2 Eden 197.....	389
Stanley v. Grundy, 1883, 22 Ch.D. 478, 3 R.C. 569.....	582, 700
Stapilton v. Stapilton, 1739, 1 Atk. 2, 1 W. & T.L.C. Eq. 234.....	42
Stapleford Colliery Co., In re, Barrow's Case, 1880, 14 Ch.D. 432 103	
Stark v. Reid, 1895, 26 O.R. 257.....	335, 336, 337, 624
Stark v. Somerville, 1917, 40 O.L.R. 374, affirmed, 1918, 41 O.L.R. 591, 41 D.L.R. 496.....	521
Steeds v. Steeds, 1889, 22 Q.B.D. 537.....	500
Steers v. Rogers, [1893] A.C. 232.....	231, 594
Steinhoff v. Brown, 1865, 11 Gr. 114.....	592, 688
Stephen v. Bannan and Gray, 1913, 6 A.L.R. 418, 14 D.L.R. 333.....	185
Stephens v. Simpson, 1866, 12 Gr. 493.....	400
Sterling v. Riley, 1862, 9 Gr. 343.....	435
Sterling Lumber Co. v. Jones, 1916, 36 O.L.R. 153, 29 D.L.R. 288 130	
Sterne v. Beck, 1863, 1 DeG. J. & S. 595.....	378
Stevens' Will, In re, 1868, L.R. 6 Eq. 597, 18 R.C. 238.....	217
Stevens v. Mid-Hants Ry. Co., 1873, L.R. 8 Ch. 1064.....	347
Stevens v. Theatres, [1903] 1 Ch. 857.....	662
Stewart v. Edwards, Re, 1905, 11 O.L.R. 378.....	371
Stewart v. Ferguson, 1899, 31 O.R. 112.....	601
Stewart v. Rowson, 1892, 22 O.R. 533.....	658, 669
Stikeman v. Fummerton, 1911, 21 M.R. 754.....	702
Stinson v. Pennock, 1868, 14 Gr. 604.....	737
Stockton Iron Furnace Co., In re, 1879, 10 Ch.D. 335, 699, 700, 702	
Stoddart v. Union Trust, [1912] 1 K.B. 181.....	206
Stone v. Lickorish, [1891] 2 Ch. 363.....	621, 629
Stothers v. Borrowman, 1916, 38 O.L.R. 12, 33 D.L.R. 179.....	196
Strachan v. Murney, 1858, 6 Gr. 378.....	446, 609
Strange v. Bedford, 1887, 15 O.R. 115.....	392
Street v. Commercial Bank of the Midland District, 1844, 1 Gr 169.....	114
Street v. Dolan, 1871, 3 Chy. Ch. (Ont.) 227.....	402
Street v. O'Reilly, 1868, 2 Chy. Ch. (Ont.) 270.....	451
Strode v. Russel, 1708, 2 Vern. 621.....	216
Strong v. Carlyle Press, [1893] 1 Ch. 268.....	687
Sturgess v. Bitner, 1861, 11 U.C.C.P. 102.....	206
Sun Life Assurance Co. and Widmer, Re, 1916, 26 D.L.R. 117 170, 478, 685	
Superior Savings and Loan Society v. Lucas, 1879, 44 U.C.R. 106 357	
Sutton v. Sutton, 1882, 22 Ch.D. 511, 16 R.C. 298.....	367, 516,
Swan v. Wheeler, 1909, 2 S.L.R. 269.....	
Sweny v. Smith, 1869, L.R. 7 Eq. 324.....	4
Swift v. Minter, 1879, 27 Gr. 217.....	466
Sydie v. Saskatchewan and Battle River Land and Development Co., 1913, 6 A.L.R. 388, 14 D.L.R. 51.....	177
Syndicat Lyonnais du Klondyke v. McGrade, 1905, 36 Can. S.C.R. 251.....	177

TABLE OF CASES

lxvii

Tacon v. Monolithic Building Co., In re Monolithic Building Co., [1915] 1 Ch. 643.....	128, 176
Tadman v. Henman, [1893] 2 Q.B. 168.....	706
Tahiti Cotton Co., In re, Ex parte Sargent, 1874, L.R. 17 Eq. 273	191
Talbot v. Braddil, 1688, 1 Vern. 394.....	5
Tanner v. Heard, 1857, 23 Beav. 555, 18 R.C. 458.....	682
Tanner v. Smart, 1827, 6 B. & C. 603, 16 R.C. 160.....	520
Tanqueray-Willaine and Landau, In re, 1882, 20 Ch. 476.....	32
Tarn v. Turner, 1888, 39 Ch.D. 456.....	255, 403, 504, 505, 658
Tasker v. Small, 1837, 3 My. & Cr. 63.....	505
Tassel v. Smith, 1858, 2 DeG. & J. 713.....	138
Taylor v. Davies, 1917, 41 O.L.R. 403.....	525, 545
Taylor v. London and County Banking Co., [1901] 2 Ch. 231	
	94, 99, 101, 104
Taylor v. Mostyn, 1886, 33 Ch.D. 226.....	595
Taylor v. Russell, [1892] A. C. 244, [1891] 1 Ch. 8, 10 R.C. 544	
	103, 104, 191
Tebb v. Hodge and Cutten, 1869, L.R. 5 C.P. 73, 18 R.C. 16.....	76
Teeter v. St. John, 1863, 10 Gr. 85.....	415
Teevan v. Smith, 1882, 20 Ch.D. 724.....	
	302, 326, 327, 328, 329, 331, 332, 490, 508
Tennant v. Trenchard, 1869, L.R. 4 Ch. 537.....	390, 465
Toulon v. Curtis, 1832, Younge 610.....	4, 5
Thibodo v. Collar, 1850, 1 Gr. 147.....	389
Thomas v. Cameron, 1885, 8 O.R. 441.....	701
Thomas v. Girvan, 1897, 1 N.B. Eq. 257.....	612, 624
Thomas v. Thomas, 1856, 22 Beav. 341.....	149
Thompson, In re, Ex parte Williams, 1877, 7 Ch.D. 138.....	702
Thompson v. Bergland, 1910, 3 S.L.R. 470.....	479
Thompson v. Bowyer, 1863, 9 Jur. N.S. 863.....	566
Thompson v. Drew, 1855, 20 Beav. 49.....	599
Thompson v. Holman, 1880, 28 Gr. 35.....	668, 669
Thompson and Holt, In re, 1890, 44 Ch.D. 492.....	659
Thompson v. Hudson, 1870, L.R. 10 Eq. 497.....	598
Thompson v. Thompson, 1904, 37 N.S.R. 242.....	414
Thompson v. Warwick, 1894, 21 O.A.R. 637.....	333
Thomson v. Hamilton, 1835, 5 U.C.O.S. 111.....	498
Thomson v. O'Toole, 1888, 21 N.S.R. 1.....	611
Thomson v. Stikeman, 1913, 30 O.L. 123, 17 D.L.R. 205, affirming	
	29 O.L.R. 146, 14 D.L.R. 97.....
	233
Thomson v. Willson, 1915, 51 Can. S.C.R. 307, 23 D.L.R. 468,	
varying Willson v. Thomson, 1914, 31 O.L.R. 471, 19 D.L.R.	
	593.....
	381, 390, 447
Thorn v. City Rice Mills, 1889, 40 Ch.D. 357.....	376
Thornbrough v. Baker, 1677, 1 Cas. in Ch. 283, 2 W. & T. L.C. Eq.	
1, S.C. <i>sub nom.</i> Thornborough v. Baker, 3 Swanst. 628,	
2 Freeman 143, 18 R.C. 231.....	36, 37, 52, 465

Thorne v. Cann, [1895] A.C. 11, 18 R.C. 552....	339, 340, 343, 347
Thorne v. Heard & Marsh, [1895] A.C. 495.....	399, 517, 545
Thornhill v. Manning, 1851, 1 Sim. N.S. 451.....	452
Thornton v. France, [1897] 2 Q.B. 143.....	127, 550
Thorpe, In re, 1868, 15 Gr. 76.....	316
Three Towns Banking Co. v. Maddever, In re Maddever, 1884, 27 Ch.D. 523.....	487
Threlfall, In re, 1880, 16 Ch.D. 274.....	699
Threlfall v. Wilson, 1883, 8 P.D. 18.....	401
Thuresson, In re, 1902, 3 O.L.R. 271.....	385
Thurlow v. Mackeson, 1868, L.R. 4 Q.B. 97.....	672, 683
Tiffany v. Clarke, 1858, 6 Gr. 477.....	193
Tighe v. Dolphin, [1906] 1 I.R. 305.....	248
Tillett v. Nixon, 1883, 25 Ch.D. 238.....	689
Tilling v. Blythe, [1899] 1 Q.B. 557.....	432
Todd v. Linklater, 1901, 1 O.L.R. 103.....	140, 379, 447, 652
Tolhurst, Re, 1906, 12 O.L.R. 45.....	291
Tolhurst v. Associated Cement Manufacturers, [1903] A.C. 414..	197
Toller v. Carteret, 1705, 2 Vern. 494.....	392
Tom Gung v. Fong Lee, 1915, 48 N.S.R. 317, 22 D.L.R. 809.....	110
Toms v. Wilson, 1862, 4 B. & S. 442.....	501
Topham v. Booth, 1887, 35 Ch.D. 607.....	526
Toronto (City of) v. Jarvis, 1895, 25 Can. S.C.R. 237.....	121
Toronto General Trusts Corporation v. The King, 1917, 56 Can. S.C.R. 26.....	158
Toronto General Trusts Corporation v. Ritchie, 1915, 8 O.W.N. 328.....	746
Totten v. Douglas, 1869, 15 Gr. 126, 16 Gr. 243.....	203
Totten v. Watson, 1870, 17 Gr. 233.....	608
Toulmin v. Steere, 1817, 3 Mer. 210.....	342, 346, 347
Towerson v. Jackson, [1891] 2 Q.B. 484.....	256, 257
Tracy, In re, Scully v. Tracy, 1894, 21 O.A.R. 454.....	501
Tracy v. Lawrence, 1854, 2 Dr. 403.....	659
Traders Bank v. Murray, Re Hague, 1887, 14 O.R. 660.....	288
Travato v. Dominion Cannery, 1916, 35 O.L.R. 295, 26 D.L.R. 507	550
Trent v. Hunt, 1853, 9 Ex. 14.....	255
Trimleston (Lord) v. Hannall, 1810, 1 Ball & B. 377.....	582, 589
Trinidad Asphalt Co. v. Coryat, [1896] A.C. 587.....	119
Trinity College v. Hill, 1884, 10 O.A.R. 99, 8 O.R. 286.....	452, 454
Trotter and Douglas v. Calgary Fire Insurance Co., 1910, 3 A.L.R. 12.....	714
Troughton v. Troughton, 1748, 1 Ves. Sen. 86.....	150
Trulock v. Robey, 1841, 12 Sim. 402.....	566
Truman & Co. v. Redgrave, 1881, 18 Ch.D. 547.....	689, 690
Trust and Loan Co. v. Cuthbert, 1868, 14 Gr. 410.....	261
Trust and Loan Co. v. Gallagher, 1879, 8 O.P.R. 97.....	310

TABLE OF CASES

Ixi

Trust and Loan Co. v. Kirk, 1880, 8 O.P.R. 203.....	609
Trust and Loan Co. v. Lawrason, 1882, 10 Can. S.C.R. 679, affirm- ing 6 O.A.R. 286.....	696, 697, 702, 704, 707
Trust and Loan Co. v. McGillivray, 1878, 7 O.P.R. 318.....	621
Trust and Loan Co. v. McKenzie, 1896, 23 O.A.R. 167.....	243
Trust and Loan Co. v. Stevenson, 1892, 20 O.A.R. 66.....	526, 536, 549
Trustees, Executors, and Agency Co. v. Short, 1888, 13 App. Cas. 793.....	537
Trusts and Guarantee Co. v. Abbott Mitchell Iron and Steel Co., 1902, 11 O.L.R. 403.....	84
Trusts and Guarantee Co. v. The King, 1916, 51 Can. S.C.R. 107, 32 D.L.R. 169, affirming 15 Can. Ex. R. 103, 26 D.L.R. 129, 218	
Trusts Corporation of Ontario and Boehmer, In re, 1894, 26 O.R. 191.....	124
Trusts Corporation of Ontario v. Hood, 1896, 23 O.A.R. 589.....	207
Trusts Corporation of Ontario v. Rider, 1897, 24 O.A.R. 157, 27 O.R. 593.....	196
Tucker v. Armour, 1906, 6 N.W.T.L.R. 388.....	178
Turley v. Williamson, 1865, 15 U.C.C.P. 538.....	550
Turner v. Clark, 1909, 2 S.L.R. 200.....	181
Turner v. Hancock, 1882, 20 Ch.D. 303.....	623
Turner v. Smith, [1901] 1 Ch. 213.....	197
Turner v. Walsh, [1909] 2 K.B. 484.....	254, 359
Tweedale v. Tweedale, 1857, 23 Beav. 341.....	138
Tylee v. Hinton, 1878, 3 O.A.R. 53.....	378, 446
Tyler v. Lake, 1832, 4 Sim. 53.....	343
Tyrwhitt v. Tyrwhitt, 1863, 32 Beav. 244.....	340
Underwood, In re, 1857, 3 K. & J. 745.....	319
Underhay v. Read, 1887, 20 Q.B.D. 209.....	688
Union Assurance Co., Re, 1893, 23 O.R. 627.....	139, 720
Union Bank of Canada v. Bates, 1914, 24 M.R. 619, 18 D.L.R. 269	675
Union Bank of Canada v. Engen, 1917, 10 S.L.R. 185, 33 D.L.R. 435.....	687
Union Bank of Canada v. Lumsden Milling Co., 1915, 8 S.L.R. 263, 23 D.L.R. 460.....	172
Union Bank of Canada v. Taylor, 1915, 33 O.L.R. 255, 23 D.L.R. 679.....	124
Union Bank of Halifax v. Indian and General Investment Trust Co., 1908, 40 Can. S.C.R. 510.....	84, 102
Union Bank of London v. Ingram, 1880, 16 Ch.D. 53, 588, 597, 606	
Union Bank of London v. Ingram, 1882, 20 Ch.D. 463.....	458
Union Bank of Scotland v. National Bank of Scotland, 1886, 12 App. Cas. 53.....	122
Uren v. Confederation Life Association, 1917, 40 O.L.R. 536 ..	653, 670
Vacuum Oil Co. v. Ellis, [1914] 1 K.B. 693.....	254, 351, 686, 687

Valletort Sanitary Steam Laundry Co., In re, Ward v. Valletort, [1903] 2 Ch. 654.	84
Valpy, In re, [1906] 1 Ch. 531.	273
Van Gelder, Apsimon & Co. v. Sowerby Bridge United District Flower Co., 1890, 44 Ch.D. 371.	359
Vandelinder v. Vandelinder, 1861, 14 U.C.C.P. 429.	77
Vanluven and Walker, Re, 1900, 19 O.P.R. 216.	628
Vernon v. Bethell, 1762, 2 Eden 110.	45
Vining, In Re, Ex parte Hoogen, 1870, L.R. 10 Eq. 63.	594
Vint v. Padget, 1858, 2 DeG. & J. 611.	143
Voisey, Ex parte, In re Knight, 1882, 21 Ch.D. 442, 698, 699, 702, 706	
Vousden v. Hopper, 1911, 4 S.L.R. 1.	708
Waddell v. McColl, 1868, 14 Gr. 211.	593, 606
Wade v. Paget, 1781, 1 Bro. C.C. 363.	677
Wafer v. Taylor, 1852, 9 U.C.R. 609.	577, 578
Wakefield and Barnsley Union Bank v. Yates, [1916] 1 Ch. 452	
	544, 559
Wales v. Carr, [1902] 1 Ch. 860.	617, 618
Walhampton Estate, In re, 1881, 26 Ch.D. 391.	144
Walker v. Dickson, 1892, 20 O.A.R. 96.	234, 235, 407
Walker v. Jones, 1866, L.R. 1 P.C. 50.	301, 496
Walker v. Linon, [1907] 2 Ch. 104.	97
Wallace v. Kelsall, 1810, 7 M. & W. 264.	500
Wallace v. Smart, 1912, 22 M.R. 68, 1 D.L.R. 70.	170
Wallbridge v. Martin, 1868, 2 Chy. Ch. (Ont.) 275.	429
Wallingford v. Mutual Society, 1880, 5 App. Cas. 685.	606
Wallis, In re, Ex parte Jenks, [1902] 1 K.B. 719.	79
Wallis, In re, Ex parte Lickorish, 1890, 25 Q.B.D. 476, 588, 622, 629	
Walters v. Northern Coal Mining Co., 1855, 5 DeG. M. & G. 629.	91
Wamy v. Robins, 1888, 15 O.R. 471.	131
Ward v. Carttar, 1865, L.R. 1 Eq. 29.	497, 563
Ward v. Duncombe, [1893] A.C. 369.	94
Wardle v. Oakley, 1864, 36 Beav. 27.	79
Waring v. Ward, 1802, 7 Ves. 332.	234
Warner v. Don, 1896, 26 Can. S.C.R. 388.	21
Warner v. Jacob, 1882, 20 Ch.D. 220, 18 R.C. 452.	666, 680
Warnock v. Prieur, 1887, 12 O.P.R. 261.	419
Warren v. Taylor, 1862, 9 Gr. 59.	434
Warwick v. Sheppard, 1917, 39 O.L.R. 99, 35 D.L.R. 98, 131, 132, 133	
Wason v. Carpenter, 1867, 13 Gr. 329.	579
Wasson v. Harker, 1912, 5 S.L.R. 261, 8 D.L.R. 88.	379, 429, 472, 484
Waterloo Manufacturing Co. v. Holland, 1917, 10 S.L.R. 300, 36 D.L.R. 216.	586
Waterous Engine Works Co. v. Livingstone, 1904, 7 O.L.R. 740.	314
Waterous Engine Works v. Wells and Bank of Montreal, 1911, 4 S.L.R. 48.	701

TABLE OF CASES

xxi

Waters v. Shade, 1851, 2 Gr. 457.....	505
Watkins v. McKellar, 1859, 7 Gr. 584.....	675
Watling v. Lewis, [1911] 1 Ch. 41.....	370
Watson v. Dowser, 1881, 28 Gr. 4.....	129
Watson v. Mid-Wales Railway Co., 1882, 11 R. 2 C.P. 593.....	145, 202
Watt v. Peader, 1862, 12 U.C.C.P. 254.....	193
Watts, In re, Smith v. Watts, 1882, 22 Ch.D. 5.....	624
Watts v. Symes, 1851, 1 DeG. M. & G. 240.....	138, 142, 343, 347
Wayne v. Hanham, 1851, 9 Hare 62.....	388
Webb, In re, Lambert v. Still, [1894] 1 Ch. 73.....	574
Webb v. Crosse, [1912] 1 Ch. 323.....	497, 626
Webb v. Smith, 1885, 30 Ch.D. 192.....	244, 247
Webber v. O'Neil, 1864, 10 Gr. 440.....	232
Wegg Prosser v. Evans, [1891] 2 Q.B. 101 [1895] 1 Q.B. 108.....	605, 704
Weidman v. McClary Mfg. Co., 1917, 10 S.L.R. 142, 33 D.L.R. 672, 171, 172	
Wet v. Niagara Grape Co., 1886, 11 O.R. 700.....	113
Weldon v. Rallison, 1656, 1 Rep. in Ch. 171.....	40
Wells v. Trust and Loan Co. of Canada, 1884, 9 O.R. 170.....	620
Werthe v. Davie, 1916, 11 A.L.R. 46, 32 D.L.R. 384.....	473
West v. Fritche, 1848, 3 Exch. 216.....	698, 704
West v. Jones, 1851, 1 Sim. N.S. 205.....	624
West v. Williams, [1899] 1 Ch. 132.....	124, 125
West of England Fire Insurance Co. v. Isaacs, [1897] 1 Q.B. 226.....	723
West London Commercial Bank v. Reliance Permanent Building Society, 1885, 29 Ch.D. 554.....	330
Western Assurance Co. v. Temple, 1901, 31 Can. S.C.R. 373.....	713
Western Canada Loan and Savings Co. v. Court, 1877, 25 Gr. 151	682
Western Wagon Co. v. West, [1892] 1 Ch. 271.....	618, 619
Westmoreland, etc., Slate Co. v. Fielden, [1891] 3 Ch. 15.....	704
Wetherell, Ex parte, 1805, 11 Ves. 398, 18 R. C. 35.....	79
Whaley v. Linnenbank, 1916, 36 O.L.R. 361, 29 D.L.R. 51.....	132
Wheatley v. Silkstone and Haigh Moor Coal Co., 1885, 29 Ch.D. 715.....	84
Wheeler v. Brooke, 1894, 26 O.R. 96.....	331, 332
Wheeler v. Montefiore, 1841, 2 Q.B. 133.....	360
Whitcomb v. Minchin, 1820, 5 Madd. 91.....	674
White v. City of London Brewing Co., 1889, 42 Ch.D. 237, 585, 589, 591	
White v. Metcalfe, [1903] 2 Ch. 567.....	691, 692
Whiteley v. Delaney, [1914] A.C. 132, reversing Manks v. White- ley, [1912] 1 Ch. 735, and restoring [1911] 2 Ch. 448 245, 339, 341, 342, 345, 346	
Whitfield v. Roberts, 1861, 7 Jur. N.S. 1268.....	454
Whitley v. Challis, [1892] 1 Ch. 64.....	690

Whitlow v. Stimson, 1909, 14 B.C.R. 321.....	51
Whitting, In re, Ex parte Hall, 1879, 10 Ch.D. 615.....	73
Wickens, Ex parte, [1898] 1 Q.B. 543.....	382, 490
Wickens v. Shuckburgh, 1898, 78 L.T. 213.....	382
Wigan v. English and Scottish Law Life Assurance Association, [1909] 1 Ch. 291.....	34
Wightman v. Fields, 1872, 19 Gr. 559.....	61
Wigle v. Settrington, 1872, 19 Gr. 512.....	231
Wiley v. Ledyard, 1883, 10 O.P.R. 182.....	417, 576, 587
Wilgress v. Crawford, 1888, 12 O.P.R. 658.....	422
Wilkes v. Boddington, 1707, 2 Vern. 599.....	104
Wilkes v. Collin, 1869, L.R. 8 Eq. 338.....	340
Wilkins v. McLean, 1885, 10 O.R. 58, reversed 13 O.A.R. 467, restored <i>sub nom.</i> McLean v. Wilkins, 1887, 14 Can. S.C.R. 22	592
Wilkinson v. Candlish, 1854, 5 Ex. 91.....	501
Wilkinson v. Grant, 1856, 18 C.B. 319.....	618
Wilkinson v. Hall, 1837, 3 Bing. N.C. 508.....	357
Williams, Ex parte, In re Raggett, 1880, 16 Ch.D. 117.....	141
Williams, Ex parte, In re Thompson, 1877, 7 Ch.D. 138.....	702
Williams, Re, 1903, 9 O.L.R. 156.....	289
Williams v. Bosanquet, 1819, 1 Brod. & B. 238, 3 Moore 500, 21 R.R. 585.....	89
Williams v. Box, 1910, 44 Can. S.C.R. 1, reversing 19 M.R. 560 190, 467, 469, 485	582
Williams v. Box (no. 2), 1913, 24 M.R. 31, 15 D.L.R. 261.....	370
Williams v. Hathaway, 1877, 6 Ch.D. 544.....	367, 396
Williams v. Hunt, [1905] 1 K.B. 512.....	389
Williams v. Morgan, [1906] 1 Ch. 804.....	51
Williams v. Owen, 1840, 5 My. & Cr. 303.....	280, 394
Williams v. Thomas, [1909] 1 Ch. 713.....	142
Willie v. Lugg, 1761, 2 Eden 78.....	545
Willis v. Earl How, [1893] 2 Ch. 545.....	398
Wills v. Luff, 1888, 38 Ch.D. 197.....	
Willson v. Thomson, 1914, 31 O.L.R. 471, 19 D.L.R. 593, varied <i>sub nom.</i> Thomson v. Willson, 1915, 51 Can. S.C.R. 307, 23 D.L.R. 468.....	381, 390, 447
Wilson, Ex parte, 1813, 2 Ves. & B. 252, 18 R.C. 382.....	577
Wilson v. Campbell, 1879, 8 O.P.R. 154.....	611
Wilson v. Campbell, 1893, 15 O.P.R. 254.....	378, 379, 447
Wilson v. Cluer, 1840, 3 Beav. 136.....	596
Wilson v. Fleming, 1893, 24 O.R. 388.....	370
Wilson v. Kyle, 1880, 28 Gr. 104.....	197
Wilson v. Queen's Club, [1891] 3 Ch. 522.....	257
Wilson v. Taylor, 1912, 4 O.W.N. 253, 7 D.L.R. 317, 23 O.W.R. 359.....	666, 670
Willson v. Walton and Kirkdale Permanent Building Society, 1903, 19 Times L.R. 408.....	558

TABLE OF CASES

lxxiii

Wilton v. Dunn, 1851, 17 Q.B. 294	255
Wiltse v. Excelsior Life Insurance Co., 1916, 10 A.L.R. 67, 29 D.L.R. 32	50
Wiltshire v. Smith, 1744, 3 Atk. 89	497
Winberg and Kettle, Re, 1917, 12 O.W.N. 327	661
Winchester (Bishop of) v. Paine, 1805, 11 Ves. 194	512
Winters v. McKinstry, 1902, 14 M.R. 294	671, 678
Winthrop v. Roberts, 1907, 17 M.R. 220	51
Withington v. Tate, 1869, L.R. 4 Ch. 288	498
Wodehouse v. Scobell, In re Repington, [1904] 1 Ch. 811	246
Wolverhampton and Staffordshire Banking Co. v. George, 1883, 24 Ch.D. 707	421
Wood v. Wheeler, 1882, 22 Ch.D. 281	552
Wood v. Williams, 1819, 4 Madd. 186, 20 R.R. 291	400
Wood v. Wood, 1869, 16 Gr. 471	260
Woodall, In re, 1904, 8 O.L.R. 288	524
Woodruff v. Mills, 1860, 20 U.C.R. 51	345
Woolston v. Ross, [1900] 1 Ch. 788	255
Worthington & Co. v. Abbott, [1910] 1 Ch. 588	384
Worthington and Armand, Re, 1915, 33 O.L.R. 191, 21 D.L.R. 402	319
Wragg v. Denham, 1836, 2 Y. & C. Ex. 117	584, 594
Wright, Ex parte, 1812, 19 Ves. 255	81
Wright v. Kirby, 1857, 23 Beav. 463	627
Wright v. Leys, 1885, 8 O.R. 88	205
Wright v. Morgan, 1877, 1 O.A.R. 613	418
Wrigley v. Gill, [1905] 1 Ch. 241, [1906] 1 Ch. 165	598, 612
Wrixon v. Vize, 1842, 3 Dr. & War. 104	536, 543
Wyndham v. Lord Egremont, 1775, Ambl. 753	340
Yarmouth, Re, 1879, 26 Gr. 593	5
Yarrington v. Lyon, 1866, 12 Gr. 308	193
Yates, In re, Batcheldor v. Yates, 1888, 38 Ch.D. 112	669
Yates v. Aston, 1843, 4 Q.B. 182	367
Yates v. Hambley, 1742, 2 Atk. 360	4
Yem v. Edwards, 1857, 1 DeG. & J. 598	91
York Union Banking Co. v. Artley, 1879, 11 Ch.D. 205	388, 389
Yorkshire Banking Co. v. Mullan, 1887, 35 Ch.D. 125	577
Yorkshire Railway Wagon Co. v. Maclure, 1881, 19 Ch.D. 478	487
Yorkshire Woolcombers Association, In re, Houldsworth v. Yorkshire, [1903] 2 Ch. 284, [1904] A.C. 355	83
Zimmerman v. Sproat, 1912, 26 O.L.R. 448, 5 D.L.R. 452	78
Zock v. Clayton, 1913, 28 O.L.R. 447, 13 D.L.R. 502	166

Corrigenda.

Page 40, line 18. For "equity" read "in equity."

Page 94, note (b), line 11. For "reality" read "realty."

Page 98, note (c), line 2. For "18 R.C." read "21 R.C."

Pages 161, 170, 485. Mutual Life Assurance Co. v. Douglas. See

Table of Cases.

Page 271, line 4. For "is now capable of existing" read "if now capable of existing."

Page 276, line 2. For "Mason v. Bogg" read "Mason v. Bogg."

Page 325. Colyer v. Colyer, Pawley v. Colyer. Insert "3" before "DeG. J. & Sm."

PART I.

THE CONTRACT OF MORTGAGE.

CHAPTER I.

INTRODUCTORY.

- §1. Ancient forms of mortgage, p. 1.
- §2. Welsh mortgage, p. 4.
- §3. Sources of modern law of mortgage, p. 5.
- §4. Definition of mortgage, p. 6.
- §5. The Conveyancing and Law of Property Act, p. 7.
- §6. Fraudulent and voluntary mortgages, p. 11.

§1. *Ancient forms of mortgage.*

The giving of land as a security for a debt was well known to early law, and the machinery adopted for effecting this purpose was very various (a).

When Glanvil wrote in the twelfth century, two general rules might be stated. (1) The mortgagee was always in possession. A mere agreement that property should be security for a debt was not recognized by the king's court. (2) The transaction might be either *mortuum vadium* (*mort gage*, dead gage) or *vivum vadium* (*vif gage*, live gage). In the former case the profits of the land did not go in reduction of the debt; and though a creditor who made this bargain

(a) This introductory historical sketch of mortgage at common law is based chiefly upon Holdsworth, *History of English Law*, vol. 3, pp. 110-114, and Pollock and Maitland, *History of English Law*, vol. 2, pp. 117-124 ("The Gage of Land"). See also H. D. Hazeltine, *Geschichte des englischen Pfandrechts*, pp. 201 ff; Hazeltine, *The Gage of Land in Medieval England*, 17 Harv. L.R. 549, 18 Harv. L.R. 36, reprinted in *Select Essays in Anglo-American Legal History*, vol. 3, pp. 646-672.

fell into the sin of usury, it was not prohibited by the law. In the latter case the profits went in reduction of the debt, and it was considered to be a fair and honourable bargain. In any case the creditor's interest in the land was a special one, as mortgagee, that is, in the nature of a charge which could be enforced only upon application to the court.

The great defect of the transaction lay from the debtor's point of view in the fact that he lost possession, from the creditor's point of view in the fact that his possession was not protected by the assizes—if ejected, even by the mortgagor, he could not recover the land. It is probably due chiefly to the latter cause that the peculiar interest of the mortgagee, as defined by Gilanvil, disappeared. He ceased to take a peculiar interest as mortgagee, and took instead one of the recognized estates or interests in the land. He must be tenant for years, or for life, or in fee. In the first case he obtained his rights under a demise for years and had the termor's remedies. In the other cases he must be enfeoffed and he had the freeholder's remedies.

Accordingly, when Bracton wrote, in the thirteenth century, there were three methods by which the creditor might take a security upon his debtor's land. (1) The debtor might give the creditor a lease at a nominal rent. The rents and profits of the land paid off the debt, and provided interest for the creditor, without suspicion of his committing the sin of usury. (2) The debtor might convey the land to the creditor for a term of years, with a proviso that if the debt be not paid at the end of the term the creditor should keep the land in fee. (3) The debtor might convey the land to the creditor in fee, with a proviso that if the debt was paid by a fixed date the land should be reconveyed; and this condition was strictly construed. Britton distinctly denies that there can be any equity of redemption. Both the second and the third forms were known to Littleton, but it is the third form which ulti-

mately prevailed. It gained in popularity from the fourteenth century onwards; and, when the rules as to the creation of future estates in the land became more definitely fixed, the lawyers began to think that the second form of mortgage, according to which a term of years swells into a fee by the happening of an event, is legally impossible. Just as the rules of the king's courts as to the kinds of seisin protected by the assizes destroyed the twelfth century estate in mortgage, so the later rules of the common law as to the modes in which the estates of which men could be seised might be manipulated, limited to one type the interest of the mortgagee. He took an estate defeasible upon condition subsequent. His estate was, it is true, only a security for money lent, and Littleton recognised this, but, as a result of the strictness with which such conditions were construed, this feature of his estate was obscured till the Court of Chancery began to erect the elaborate superstructure of our present mortgage upon the basis provided by the medieval common law. The narrowness of this basis has necessitated the elaboration of the superstructure, and has caused the consequent complication of the law. That the basis was so narrow was due in part to the hasty generalizations of the lawyers of the thirteenth century, in part to the technical doctrines of the lawyers of the succeeding three centuries (b).

When Littleton wrote, at the end of the fifteenth century, the position of the mortgagee had become definitely fixed (c). Coke translates Littleton's language as follows: "Item, if a feoffment be made upon such condition, that if the feoffor pay to the feoffee at a certain day, etc., 40 pounds of money,

(b) Holdsworth, *op. cit.*, vol. 3, pp. 111-112. Pollock and Maitland (*op. cit.*, vol. 1, p. 123), point out that if the Jews had not been expelled from England a simpler form of mortgage than the conditional feoffment might have been adopted by the common law from the form recognized by the Jewish Exchequer.

(c) Holdsworth, *op. cit.*, vol. 2, p. 490.

that then the feoffor may re-enter, etc., in this case the feoffee is called tenant in morgage, which is as much to say in French as *mortgage* and in Latine *mortuum vadium*. And it seemeth that the cause why it is called mortgage is, for that it is doubtful whether the feoffor will pay at the day limited such sum or not: and if he doth not pay, then the land which is put in pledge upon condition for the payment of the money, is taken from him forever, and so dead." (d)

It is to be noted that Glanvil and Littleton give different explanations of the term "mortgage." According to Glanvil the gage is "dead" when the profits are not working off the debt and interest. According to Littleton the gage is "dead" to the debtor if the debt is not paid to date. These different explanations are suited to the state of the law at the periods when these authors wrote respectively (e).

§2. *Welsh mortgage.*

A Welsh mortgage is a practically obsolete form of security (f). It should not, however, be overlooked as it is mentioned in reported decisions in comparatively modern times, and it affords an interesting example of the survival of certain features of ancient forms of mortgage mentioned by Glanvil and Bracton. It is an assurance by which, to secure a debt, property is conveyed to the creditor without any condition or proviso for reconveyance or defeasance and usually without any condition or covenant for payment (g).

(d) Co. Litt. 205a; Litt. s. 332.

(e) Holdsworth, *op. cit.*, vol. 3, p. 110, note.

(f) See 21 Halsbury, Laws of England, pp. 87-8.

(g) The mortgagor may redeem at any time, but in the absence of a covenant for payment the mortgagor cannot be sued personally. *Howel v. Price*, 1715, 1 P. Wms. 291; *Yates v. Hambley*, 1742, 2 Atk. 360, at p. 363; *Lawley v. Hooper*, 1745, 3 Atk. 278; *Teulon v. Curtis*, 1832, Younge 610; *Balfie v. Lord*, 1842, 2 Dr. & W. 480, at pp. 486-8, 18 R.C. 481, at pp. 486-7; *Cassidy v. Cassidy*, 1889, 24 L.R. Ir. 577.

it being of the essence of the transaction that the mortgagee should have possession and receipt of the rents and profits (*b*). The mortgagee must receive the rents and profits either in lieu of interest (*i*) or in payment on account of principal and interest. In the former case the mortgagee is not under liability to account for what he receives, but in the latter case an account may be directed (*j*). The continued possession of the mortgagee will not bar the right of redemption until the expiration of the full statutory period (*k*) after the mortgage has been satisfied (*l*). There being no condition, there can be no forfeiture and no foreclosure (*m*).

§3 *Sources of modern law of mortgage.*

The present law of mortgage is the joint product of the ancient common law, the intermediate equity and the modern statute (*n*). It is of importance to discuss many of the principles of the law of mortgage from the historical point of view, and to consider, firstly, what the common law was.

(*b*) *Balfe v. Lord, supra*

(*i*) *Talbot v. Braddil*, 1688, 1 Vern. 394. This is a Welsh mortgage strictly so called. 21 Halsbury, Laws of England, p. 88.

(*j*) *Teulon v. Curtia, supra*.

(*k*) See chapter 26, *Limitation of Actions*, §277.

(*l*) *Fenwick v. Reed*, 1816, 1 Mer. 114, at p. 125; *Orde v. Heming*, 1686, 1 Vern. 418; *Re Yarmouth*, 1879, 26 Gr. 593; *In re Cronin*, [1914] 1 I.R. 23.

(*m*) *Balfe v. Lord, supra*; *Longuet v. Scawen*, 1750, 1 Ves. Sen. 402, at p. 406; *In re Cronin*, [1914] 1 I.R. 23, at p. 29.

(*n*) *Strahan, Law of Mortgages*, 2nd ed., p. 1. The three-fold origin of the law of mortgage is made the basis of Strahan's division of the subject under the headings *Mortgages at Common Law*, *Mortgages in Equity*, *Mortgages under Statute*, *Actions for Redemption* and *Actions for Foreclosure*. The discussion, in the book just cited, of the matters which fall under the first two headings has suggested some features of the arrangement adopted in the early portion of the present book, but in other respects, for reasons stated in the text, I have adopted a different method of subdividing the main part of the subject.

secondly, how equitable doctrines were grafted on the common law, and, thirdly, how both law and equity have been modified by statute. One method of treating the subject is to state the whole law of mortgage from the point of view of the common law, then to state the result of the application of equitable principles, and finally to state the changes effected by statute. This method would have the advantage that it would emphasize the historical development of the law of mortgage, but it would suffer from the disadvantage that some topics would have to be discussed piecemeal. In a book which is intended for the use of the practitioner as well as for that of the student, it has seemed more convenient to adopt a compromise. In the early chapters some fundamental principles of the law of mortgage are discussed with special reference to the rules of the common law, the doctrines of equity and statutory changes respectively. This treatment of the subject will, it is hoped, afford a sufficient historical introduction. In the later portions of the book the arrangement of the chapters is strictly according to subject matter but at the same time the three-fold origin of the law is not overlooked in the discussion of the several topics. At the end of the book are grouped various topics with regard to which the rules are chiefly of statutory or contractual origin.

1. *Definition of mortgage.*

A mortgage is a conveyance of land as a security for the payment of a debt or the discharge of some other obligation for which it is given, the security being redeemable on the payment or discharge of such debt or obligation.

The definition given in 21 Halsbury, *Laws of England*, is adopted from the words of Lindley, M.R. in *Santley v. Wilde* (1899) 150 L.T.R. 471 and approved by Lord Halsbury in *Neokes & Co. v. Rice* (1901) A.C. 413. It is copied in the text with the exception that it is modified so as to exclude a mortgage of chattels or choses in action. The definition is also wide enough to cover all types of legal mortgages, such as those of Wild's mortgages (12)

A good statutory definition of wider scope is to be found in the Act respecting the Law and Transfer of Property R.S.O. 1897, c. 119, s. 1, as follows:

"Mortgage" shall include every instrument by virtue whereof land is in any manner conveyed, assigned, pledged or charged as security for the payment of money or money's worth, and to be re-conveyed, re-assigned or released on satisfaction of the debt (p)

15. *The Conveyancing and Law of Property Act*

The law of mortgage is of course affected in many respects by the provisions of the Conveyancing and Law of Property Act, R.S.O. 1914, c. 109. Some of these provisions are discussed in later chapters in connection with particular topics (q). Of the other provisions, which do not require special discussion in a book on mortgages but which apply to mortgages, the following are set out for convenience of reference.

2 In this Act (r)

(a) "Conveyance" shall include assignment, appointment, lease, settlement, and other assurance, made by deed, on a sale, mortgage, demise, or settlement of any property or on any other dealing with or for any property; and

(p) In the Mortgages Act, R.S.O. 1914, c. 112, s. 2, and the Conveyancing and Law of Property Act, R.S.O. 1914, c. 109, s. 2, a mortgage is defined as including "any charge on any property for securing money or money's worth." In the latter act property is defined as including "real and personal property and any debt, and any thing in action, and any other right or interest." Even if one is at liberty to qualify the definition in the Mortgages Act by confining it to real estate, the definition is defective for the present purpose because it contains no reference to the mode of creation of the charge and would in its natural meaning include a vendor's lien or any other charge arising by implication of law or equity.

(q) As to ss. 6 and 7, relating to the effect of a receipt in the body of a conveyance or endorsed thereon, see chapter 11, *Assignment of the Mortgage*, §104; as to s. 28, relating to tenancy by the curtesy, see chapter 18, *Dower and Curtesy in Mortgaged Land*, §176; as to s. 36 relating to merger, see chapter 21, *Merger*, §201; as to s. 49, relating to the assignment of choses in action, see chapter 11, *Assignment of the Mortgage*, §102.

(r) The Mortgages Act, R.S.O. 1914, c. 112, s. 2, contains identical

CHAPTER I. INTRODUCTORY.

- "convey" shall have a meaning corresponding with that of conveyance.
- (b) "Land" shall include messuages, tenements, hereditaments, whether corporeal or incorporeal, and any undivided share in land (s).
 - (c) "Mortgage" shall include any charge on property for securing money or money's worth (f).
 - (d) "Mortgage money" shall mean money or money's worth secured by a mortgage.
 - (e) "Mortgagee" shall include any person from time to time deriving title under the original mortgage.
 - (f) "Mortgagor" shall include any person from time to time deriving title under the original mortgage or entitled to redeem a mortgage according to his estate, interest or right in the mortgaged property.
 - (g) "Property" shall include real and personal property, and any debt, and any thing in action, and any other right or interest.
 - (h) "Puffer" shall mean a person appointed to bid on the part of the seller.
 - (i) "Purchaser" shall include a lessee, a mortgagee, and an intending purchaser, lessee or mortgagee, or other person who, for valuable consideration, takes or deals for any property; and "purchase" shall have a corresponding meaning with that of purchaser; but "sale" shall mean only a sale properly so called.

3 All corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, lie in grant as well as in livery.

definitions of the words "conveyance," "convey," "mortgage," "mortgage money," "mortgagee" and "mortgagor," and in addition provides as follows:

- (b) "Encumbrance" shall include a mortgage in fee, or for a less estate, a trust for securing money, a lien, and a charge of a portion, annuity or other capital or annual sum; and "encumbrancer" shall have a meaning corresponding with that of encumbrance, and shall include every person entitled to the benefit of an encumbrance, or to require payment or discharge thereof.
- (c) The Mortgages Act, s. 2, provides as follows:
 - (i) "Land" shall include tenements and hereditaments, corporeal or incorporeal, houses and other buildings, and also an undivided share in land.
 - (ii) See §4, *supra*.

15. CONVEYANCING AND LAW OF PROPERTY ACT.

9

At common law corporeal hereditaments were said to lie in livery, as being transferable by delivery of possession, while incorporeal hereditaments were said to lie in grant, because a deed of grant was required to convey them, if desired to be transferred apart from the possession of anything corporeal. Since this enactment, therefore, a simple deed of grant has been sufficient for the transfer of all freehold estates in possession or corporeal hereditaments. The method so introduced of conveying freeholds by deed of grant has superseded all others in practice (u).

The word "grant" is the proper and technical term to be employed in a deed of grant (v), but its employment is not absolutely necessary: for it has been held that other words denoting an intention to grant will answer the purpose (w). In England by the Conveyancing Act of 1881 it is declared that the use of the word "grant" is not necessary in order to convey tenements or hereditaments, corporeal or incorporeal.

4. A feoffment otherwise than by deed shall be void, and no feoffment shall have any tortious operation (x).

3.—(1) In a conveyance it shall not be necessary in the limitation of an estate in fee simple to use the word heirs; or in the limitation of an estate in tail to use the word heirs of the body; or in the limitation of an estate in tail male or in tail female, to use the words heirs male of the body, or heirs female of the body.

(2) For the purpose of such limitation it shall be sufficient in a conveyance to use the words in fee simple, in tail, in tail male, or in tail female, according to the limitation intended, or to use any other words sufficiently indicating the limitation intended.

(3) Where no words of limitation are used, the conveyance shall pass all the estate, right, title, interest, claim and demand, which the

(u) Williams, Real Property, 21st ed., p. 206. See also Armour, Real Property, 2nd ed., pp. 366 ff.

(v) Shep. Touch. 229.

(w) Shove v. Pincke, 1793, 5 T.R. 124; Haggerston v. Hanbury, 1828, 5 B & C. 101. Williams, Real Property, 21st ed., p. 215.

(x) See Armour, Real Property, 2nd ed., pp. 309, 365-6; Williams, Real Property, 21st ed., pp. 149-150.

conveying parties have, in, to, or on the property conveyed, or expressed or intended so to be, or which they have power to convey in, to, or on the same.

(4) Subsection 3 shall apply only if and as far as a contrary intention does not appear from the conveyance, and shall have effect subject to the terms of the conveyance and to the provisions therein contained.

(5) This section shall apply only to conveyances made after the 1st day of July, 1886.

11. An exchange or a partition of any tenements or hereditaments shall not imply any condition in law, and the word "give" or the word "grant" in a conveyance shall not imply any covenant in law, except so far as the word "give" or the word "grant" may, by force of any Act in force in Ontario, imply a grant.

13.—(1) Where by any letters patent, assurance or will, made and executed after the 1st day of July, 1834, land has been or is granted, conveyed or devised to two or more persons other than executors or trustees in fee simple, or for any less estate, it shall be considered that such persons took or take as tenants in common, and not as joint tenants, unless an intention sufficiently appears on the face of such letters patent, assurance or will, that they are to take as joint tenants.

(2) This section shall apply notwithstanding that one of such persons is the wife of another of them.

14. Where hereafter two or more persons acquire land by length of possession they shall be considered to hold as tenants in common and not as joint tenants.

15.—(1) Every conveyance of land, unless an exception is specially made therein, shall include all houses, out-houses, edifices, barns, stables, yards, gardens, orchards, commons, trees, woods, underwoods, mounds, fences, hedges, ditches, ways, waters, water-courses, lights, liberties, privileges, easements, profits, commodities, emoluments, hereditaments, and appurtenances whatsoever, to such land belonging or in anywise appertaining, or with the same demised, held, used, occupied and enjoyed or taken or known as part or parcel thereof; and if the same purports to convey an estate in fee simple, also the reversion or reversions, remainder and remainders, yearly and other rents, issues and profits of the same land and of every part and parcel thereof, and all the estate, right, title, interest, inheritance, use, trust, property, profit, possession, claim and demand whatsoever, of the same land, out of, or upon the same land, and every part and parcel thereof, with their and every of their appurtenances (2)

(3) Except as to conveyances under former Acts relating to

(4) As to a grant or reservation of "mining rights," see ss. 16-19 of the same Statute.

15. CONVEYANCING AND LAW OF PROPERTY ACT. 11

short forms of conveyances, this section shall apply only to conveyances made after the 1st day of July, 1886

39 It shall not be necessary, in order to maintain the defence of a purchase for value without notice, to prove payment of the mortgage money, or purchase money, or any part thereof.

40 Any property may be conveyed by a person to himself jointly with another person, by the like means by which it might be conveyed by him to another person, and may in like manner be conveyed or assigned by a husband to his wife, or by a wife to her husband alone or jointly with another person

55. If any seller or mortgagor of property or his solicitor or agent conceals any settlement, deed, will or other instrument material to the title, or any encumbrance, from the purchaser or mortgagee, or falsifies any pedigree upon which the title depends or may depend, in order to induce him to accept the title offered or produced to him, with intent to defraud such seller, mortgagor, solicitor, or agent, irrespective of any criminal liability he may thereby incur, shall be liable at the suit of the purchaser or mortgagee, or those claiming under him, for any loss sustained by them or either or any of them, in consequence of the settlement, deed, will or other instrument or encumbrance so concealed, or of any claim made by any person under such pedigree whose right was so concealed by the falsification of such pedigree; and in the case of land in estimating such damages where the property is recovered from such purchaser or mortgagee, or from those claiming under him regard shall be had to any expenditure by them, or either or any of them, in improvements on the land

16. *Fraudulent and voluntary mortgages*

It is beyond the scope of this book to discuss the law as to conveyances and mortgages made in fraud of creditors, but in order that the references to the statutes affecting the law of mortgage may be as complete as possible, the provisions of the Fraudulent Conveyances Act and the cognate provisions of the Assignments and Preferences Act are set out below

The Fraudulent Conveyances Act, R.S.O. 1914, c. 105, ss. 1 to 6, contains the following provisions with regard to conveyances (1) in fraud of creditors (a)

(2) By s. 2 "conveyance" is defined as including gift, grant, alienation, bargain, charge, encumbrance, limitation of use or uses of, in, to or out of real property or personal property by writing or otherwise, and "real property" is defined as including lands, tenements, hereditaments, and any estate or interest therein

(a) Ss. 3, 4 and 5 are derived from the English statute 13 Edw.

3. Every conveyance of real or personal property and every bond, suit, judgment and execution at any time had or made or at any time hereafter to be had or made with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties, or forfeitures shall be null and void as against such persons and their assigns.

4. Where a conveyance made by a tenant in tail is impeached under section 3, it shall nevertheless be as valid as against the heirs in tail, and all persons entitled in reversion or remainder as if this Act had not been passed.

5. Section 3 shall not extend to any estate or interest in real property or personal property conveyed upon good consideration and *bona fide* to any person not having at the time of the conveyance to him notice or knowledge of such intent.

6.—(1) Section 3 shall apply to all conveyances executed with the intent in that section set forth notwithstanding that the same may be executed upon a valuable consideration and with the intention, as between the parties to the same, of actually transferring to and for the benefit of the transferee the interest expressed to be thereby transferred, unless the same is protected under section 5 by reason of *bona fides* and want of notice or knowledge on the part of the purchaser.

(2) This section shall not apply to any instrument executed before the 2nd day of March, 1872.

It is provided by the Assignments and Preferences Act R.S.O. c. 134, ss. 5 and 6, as follows (*b*)

5.—(1) Subject to the provisions of section 6, every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects, or of bills, bonds, notes or securities, or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made by a person at a time when he is in insolvent circumstances, or is unable to pay his debts in full, or knows that he is on the eve of insolvency with intent to defeat, hinder, delay or prejudice his creditors, or any one

c. 5. S. 6 was added in 1872 by the Ontario statute 35 V. c. 11, s. 1, passed for the purpose of declaring the "true construction" of the statute of Elizabeth.

(b) The effect of these sections is carefully and concisely stated in Cassels, Ontario Assignments Act, 4th ed. 1914, pp. 9 ff

16. FRAUDULENT AND VOLUNTARY MORTGAGES.

13

or more of them, shall as against the creditor or creditors injured, delayed or prejudiced be null and void.

(2) Subject to the provisions of section 6 every such gift, conveyance, assignment or transfer, delivery over or payment made by a person being at the time in insolvent circumstances, or unable to pay his debts in full, or knowing himself to be on the eve of insolvency, to or for a creditor with the intent to give such creditor an unjust preference over his other creditors or over any one or more of them shall, as against the creditor or creditors injured, delayed, prejudiced or postponed, be null and void

(3) Subject to the provisions of section 6, if such a transaction with or for a creditor has the effect of giving that creditor a preference over the other creditors of the debtor or over any one or more of them, it shall in and with respect to any action or proceeding which, within sixty days thereafter, is brought, had or taken to impeach or set aside such transaction, be presumed *prima facie* to have been made with the intent mentioned in subsection 2, and to be an unjust preference within the meaning hereof whether the same is made voluntarily or under pressure.

(4) Subject to the provisions of section 6, if such a transaction with or for a creditor has the effect of giving that creditor a preference over the other creditors of the debtor or over any one or more of them, it shall, if the debtor within sixty days after the transaction makes an assignment for the benefit of his creditors be presumed *prima facie* to have been made with the intent mentioned in subsection 2, and to be an unjust preference within the meaning hereof, whether the same be made voluntarily or under pressure.

(5) The word "creditor" (c) in the fifth and sixth lines of subsection 2, in the second and third lines of subsection 3, and in the second and third lines of subsection 4, shall include any surety and the endorser of any promissory note or bill of exchange who would upon payment by him of the debt, promissory note or bill of exchange, in respect of which such suretyship was entered into or such endorsement was given become a creditor of the person giving the preference within the meaning of these subsections.

6.- (1) Nothing in the next preceding section shall apply to an assignment made to the sheriff of the county or district in which the debtor resides or carries on business or with the consent of a majority of his creditors having claims of \$100 and upwards computed according to the provisions of section 25, to another assignee resident within Ontario, for the purpose of paying rateably and proportionately and without preference or priority all Statute of Elizabeth.

(c) In the fifth line of sub-s. 2, in the second line of sub-s. 3, and in the second line of sub-s. 4, as printed above.

CHAPTER I. INTRODUCTORY.

the creditors of the debtor their just debts; nor to any *bona fide* sale or payment made in the ordinary course of trade or calling to an innocent purchaser or person; nor to any payment of money to a creditor, nor to any *bona fide* conveyance, assignment, transfer or delivery over of any goods or property of any kind, which is made in consideration of a present actual *bona fide* payment in money, or by way of security for a present actual *bona fide* advance of money, or which is made in consideration of a present actual *bona fide* sale or delivery of goods or other property where the money paid, or the goods or other property sold or delivered bear a fair and reasonable relative value to the consideration therefor.

(2) In the case of a valid sale of goods or other property, and payment or transfer of the consideration or part thereof by the purchaser to a creditor of the vendor, under circumstances which would render void such a payment or transfer by the debtor personally and directly, the payment or transfer, even though valid as respects the purchaser, shall be void as respects the creditor to whom the same is made.

(3) Every assignment for the general benefit of creditors, which is not void under section 5, but is not made to the sheriff, nor to any other person with the prescribed consent of creditors, shall be void as against a subsequent assignment which is in conformity with this Act, and shall be subject in other respects to the provisions thereof until and unless a subsequent assignment is executed in accordance therewith.

(4) Where a payment has been made which is void under this Act, and any valuable security was given up in consideration of the payment, the creditor shall be entitled to have the security restored, or its value made good to him before, or as a condition of, the return of the payment.

(5) Nothing herein shall

- (a) Affect *The Wages Act*, or prevent a debtor providing for payment of wages due by him in accordance with the provisions of that Act,
- (b) Affect any payment of money to a creditor, where such creditor by reason or on account of such payment, has lost or been deprived of, or has in good faith given up, any valid security which he held for the payment of the debt so paid, unless the security is restored or its value made good to the creditor,
- (c) Apply to the substitution in good faith of one security for another security for the same debt so far as the debtor's estate is not thereby lessened in value to the other creditors, or
- (d) Invalidate a security given to a creditor for a pre-existing debt where, by reason or on account of the giving of the security, an advance in money is made to the debtor.

16. FRAUDULENT AND VOLUNTARY MORTGAGES. 15

by the creditor, in the *bona fide* belief that the advance will enable the debtor to continue his trade or business and to pay his debts in full.

The Fraudulent Conveyances Act, R.S.O. 1914, c. 105, contains the following provisions with regard to the conveyances in fraud of purchasers (d) :

7. Every conveyance of real property had or made or at any time hereafter to be had or made with intent to defraud and deceive such person as may have purchased or shall afterwards purchase such real property shall be deemed only as against that person and his assigns, and all persons lawfully claiming under him, or them, who have purchased or shall hereafter purchase for money or other good consideration the same real property or any part thereof to be null and void.

8. Section 7 shall not extend to or be construed to impeach, defeat, make null or void any conveyance of real property made upon or for good consideration and *bona fide*.

9.—(1) If any person makes a conveyance of real property with any clause, provision, article, or condition of revocation, determination or alteration at his will or pleasure, and after such conveyance bargains, sells, demises, grants, conveys or charges the same or any part thereof to any person for money or other good consideration paid or given, such first conveyance not being by him revoked, made void, or altered according to the power and authority so reserved or expressed therein, then such first conveyance as touching the real property so after bargained, sold, conveyed, demised or charged against the bargainees, vendees, lessees, grantees, their heirs, successors, and their assigns and against every person lawfully claiming under them, shall be null and void.

(2) No lawful mortgage made *bona fide*, and without fraud or covin, upon good consideration shall be impeached or impaired by force of this Act, but shall have the like force and effect as if this Act had not been passed.

10. Nothing in sections 7 to 9 shall extend to a conveyance which is executed in good faith and duly registered in the proper registry office (e) or land titles office (f) before the execution of the conveyance to, and before the creation of any binding contract for the conveyance to any subsequent purchaser from the same grantor of the same real property or any part thereof, nor shall the

(d) Ss. 7, 8 and 9 are derived from the English statute 27 Eliz. c. 4. Ss. 10 and 11 were added to 1868 by the Ontario statute 31 V. c. 9, ss. 1 and 2.



same merely by reason of the absence of a valuable consideration be null and void as against such purchaser or his heirs, executors, administrators or assigns or any person claiming by, from or under any of them .

11. Nothing in the next preceding section shall have the effect of making valid any instrument which is for any reason other than or in addition to the absence of a valuable consideration void under sections 7 to 9 or otherwise; nor have the effect of making valid any instrument as against a purchaser who had, before the 28th day of February, 1868, entered into a binding contract for, or received his conveyance upon such purchase.

(e) See chapter 8, *The Registry Act*.

(f) See chapter 10, *The Land Titles Acts*.

CHAPTER II.

MORTGAGE AT COMMON LAW.

- §11. Conveyance of the legal estate, p. 17.
- §12. Forfeiture on breach of condition, p. 18.
- §13. Possession of land and title deeds, p. 19.
- §14. Accretions and fixtures, p. 20.
- §15. Capacity to make a legal mortgage, p. 24.
- §16. Capacity of married woman, p. 25.
- §17. Capacity of trustee or personal representative, p. 27.
- §18. Consideration, p. 33.

§11. *Conveyance of the legal estate.*

By the end of the fifteenth century the position of a mortgagee of land had become definitely fixed. He took an estate defeasible upon condition subsequent (*a*). The essential form of a mortgage at law became stereotyped, and to this day a legal mortgage retains the form of a conveyance of land subject to a proviso for defeasance or for reconveyance on payment (*b*), although the tendency of modern legislation is to create charges rather than mortgages strictly so called (*c*).

A conveyance of the legal estate to the mortgagee is an essential feature of a legal mortgage (*d*), and by virtue of

(*a*) See chapter 1, *Introductory*, §1.

(*b*) See definition of mortgage in §4. In Ontario a mortgage ordinarily contains a proviso for defeasance, but in England a proviso for reconveyance is usual. See 21 Halsbury, *Laws of England*, p. 121.

(*c*) See chapter 10, *The Land Titles Acts*, §93.

(*d*) As to mortgages in the form of absolute conveyances, see chapter 3, *Legal Mortgage in Equity*, §27; and as to mortgages which by reason either of their form or of their subject matter do not convey the legal estate, see chapter 5, *Equitable Mortgages*.

the conveyance the mortgage, even before entry, is seized of the land (c).

(12) *Forfeiture on breach of condition.*

The condition for reconveyance or defeasance in a mortgage being a legal condition contained in a conveyance must, like all such conditions at law, be strictly observed, otherwise the benefit of it is lost forever so far as the common law is concerned. Thus a lessee held under a lease which contained a condition that the lease should be forfeited if the lessee assigned it without the previous consent of the lessor, such consent not to be unreasonably withheld. The lessee, forgetful of this condition, assigned the lease without requesting the consent of the lessor, and although it was admitted that had he requested it the lessor would have acted unreasonably in the circumstances in withholding his consent, nevertheless it was held that the lessee having neglected to observe the condition the lease was forfeited (f). In the same way the common law insisted that the condition as to repayment of the mortgage debt must be strictly observed. If the mortgagor failed to repay the debt on the very day fixed by the mortgage for payment the benefit of the condition was gone forever and the mortgaged estate became the mortgagee's absolutely (g).

As to the appropriate words of conveyance and their effect, see chapter 1, *Introductory*, §5.

(c) In *Copestake v. Hoper*, [1908] 2 Ch. 10, it was held that a legal mortgagee who had never entered was seized within the meaning of a custom which arose prior to the statute *Quia Emptores*. See further reference to this case in chapter 3, *Legal Mortgage in Equity*, §29.

(f) *Barrow v. Isaacs & Son*, [1891] 1 Q.B. 417.

(g) *Strahan*, *Law of Mortgages*, 2nd ed., pp. 18-19. See Co Litt. 205a, quoted in §1. The same strict rule is applied to the case of a conveyance with an option to repurchase unless it appears that the transaction was intended to be a mortgage. In the latter event equity would relieve against the forfeiture as in any other case of mortgage. See chapter 3, *Legal Mortgage in Equity*, §27.

Fee condition, though it entitled the mortgagor to get back the land on repayment of the mortgage debt, was not during its continuance any estate in the land. It was merely a *bare* possibility. The benefit of it, however, descended like an estate, and so if the interest mortgaged was a fee, on the death of the mortgagor it devolved on his heir (*h*).

§13. *Possession of land and title deeds.*

A legal mortgagee by virtue of the conveyance to him of the legal estate is the terre tenant, that is to say, the person who, having a freehold interest in the land, has the personancy or possession of the rents and profits (*i*), and is entitled, in the absence of reservation or agreement to the contrary, to convert his legal right of possession into actual possession at any time (*j*).

A legal mortgagee of real estate, whether of the fee or of a life interest therein, is entitled to the muniments of title to the estate, and a legal mortgagee of leasehold is entitled to the lease and all documents relating only to the term (*k*).

It is, however, provided in Ontario by the Mortgages Act, R.S.O. 1914, c. 112, s. 4, as follows:

4. Notwithstanding any stipulation to the contrary, a mortgagor, as long as his right to redeem subsists, shall be entitled, at reasonable times, on his request, and at his own cost and on payment of the mortgagee's costs and expenses in that behalf, to inspect and make copies or abstracts of or extracts from the documents of title relating to the mortgaged property in the custody or power of the mortgagee.

(*h*) Strahan, *op. cit.*, p. 19. The courts of law did not, however, entirely lose sight of the fact that the substantial purpose of the transaction was merely to give a security to the mortgagor; see §21, *infra*. As to the present law governing the devolution of the mortgagor's interest, see chapter 17, *Persons Entitled on Death of Mortgagor*.

(*i*) Cundiff v. Fitzsimmons, [1911] 1 K.B. 513.

(*j*) See chapter 22, *Action for Possession*, §212.

(*k*) Smith v. Chichester, 1842, 2 Dr. & W. 27, 18 R.C. 128; Manners v. Mew, 1885, 29 Ch.D. 725, 8 R.C. 682.

§14. *Accretions and fixtures.*

Everything that the mortgagor adds to the property to improve its value must be taken to be an accretion for the benefit of the mortgagee (*l*), and additions made by a second mortgagee enure to the benefit of the first mortgagee (*m*). The goodwill which attaches to a particular house, as distinguished from the goodwill which attaches to a particular individual by reason of his personal skill and reputation, increases the value of the house and therefore the mortgagee is entitled to it (*n*).

If chattels are annexed or affixed to land they are thereafter known as fixtures. They lose their character of chattels and, as part of the land, assume the character of realty. The owner of chattels will therefore lose his title to them by annexing them or permitting them to be annexed to the land of another person, notwithstanding that he may stipulate for the right to remove the fixtures and thus to reconvert them into chattels. Three kinds of questions may arise as to fixtures, namely, (1) as to the degree of annexation which is required in order to convert chattels into fixtures, (2) as to the rights of the owner of the converted chattels as against the owner of the land, and (3) as to the rights of the owner of the converted chattels as against a mortgagee or grantee of the land.

(*l*) *In re Kitchen*, *Ex parte Pannett*, 1880, 16 Ch.D. 226, at p. 236; *Ex parte Biscoe*, *In re Baker*, 1849, 1 Mont. D. & DeG. 333, 18 B.C. 137. As to the renewal of a lease or the acquisition of the reversion by a mortgagor of leasehold, see §55. In Ontario under the Mechanics and Wage-Earners Lien Act the mortgagee may be deprived, to a certain extent of the benefit to which at common law he would have been entitled, of work or services performed or materials supplied upon the land for the mortgagor but not paid for by him. *Patrick v. Walbourne*, 1896, 27 O.R. 221, at p. 226. See chapter 8, *The Registry Act*, §79.

(*m*) *Landowners, etc., Co. v. Ashford*, 1880, 16 Ch.D. 411, at p. 432.

(*n*) *Cooper v. Metropolitan Board of Works*, 1883, 25 Ch.D. 472, at p. 479. See further 21 Halsbury, *Laws of England*, p. 120.

As to the degree of annexation required, *prima facie* articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, and *prima facie* articles which are affixed to the land even slightly are to be considered as part of the land. In either case the presumption may be rebutted by evidence of the purpose for which the articles were brought upon the land (*o*). Such evidence must however relate to circumstances showing the degree and object of annexation, and not merely to the agreement or intention of the parties that the articles should or should not remain chattels. If the articles in view of such circumstances are sufficiently annexed to the land they will become part of the land notwithstanding an agreement between the owner of the chattels and the owner of the land that they shall remain chattels or that the title to them shall not pass (*p*).

As between mortgagor and mortgagee the mortgagee will be entitled, unless the mortgage otherwise provides, to chattels which are annexed to the land, whether they are annexed before or after the making of the mortgage (*q*), whether the mortgage is legal or equitable (*r*), and whether the subject matter of the mortgage is freehold or leasehold (*s*). Likewise, the mortgagee of the land is entitled to fixtures as against an execution creditor of the mortgagee, even though the mortgagor has purported to mortgage the fixtures, as chattels (*t*).

(*o*) *Holland v. Hodgson*, 1872, L.R. 7 C.P. 328.

(*p*) *Hobson v. Gorringe*, [1897] 1 Ch. 182, at p. 193, 12 R.C. 208, at p. 218; *Haggert v. Brampton*, 1897, 28 Can. S.C.R. 174; *Miles v. Inkatell*, 1898, 25 O.A.R. 458; *Monti v. Barnes*, [1901] 1 K.B. 205; *Stack v. Eaton*, 1902, 4 O.L.R. 335.

(*q*) *Meux v. Jacobs*, 1875, L.R. 7 H.L. 481; *Reynolds v. Ashby & Son*, [1904] A.C. 466.

(*r*) *Meux v. Jacobs*, *supra*.

(*s*) *Reynolds v. Ashby & Son*, *supra*; *Warner v. Don*, 1896, 26 Can. S.C.R. 388.

(*t*) *Carson v. Simpson*, 1894, 25 O.R. 385; cf. *Rogers v. Ontario Bank*, 1891, 21 O.R. 416.

A different question is whether as between the mortgagor and the mortgagee, the former is entitled to remove the fixtures. Although the parties cannot by agreement prevent chattels which are annexed to the land from becoming fixtures, they may make a valid agreement that the mortgagor shall have the right to remove fixtures. Even if there is no such agreement it does not necessarily follow that the mortgagor is prevented from dealing with fixtures. In the absence of express stipulation to the contrary, a mortgagor in possession has the right to annex trade fixtures to the mortgaged premises and to remove them, provided they are removed before the mortgagee takes possession, but the right of removal ceases when possession is taken by the mortgagee (*u*).

As between the mortgagee and a third party claiming to be the owner of chattels which have become fixtures by annexation to the mortgaged land, the right to the fixtures depends upon the ordinary principles governing priorities (*v*). This question has arisen in cases where a vendor of machinery has by a hire-purchase agreement reserved the title to the machinery until payment and stipulated for the right to enter upon the purchaser's premises in the event of default under the agreement. The machinery upon being annexed to the land becomes a fixture and the vendor's claim

(*u*) *Gough v. Wood & Co.*, [1894] 1 Q.B. 713; *Ellis v. Glover & Hobson*, [1908] 1 K.B. 388. It is to be noted that in *Ellis v. Glover & Hobson*, *Cozens-Hardy M.R.* and *Farwell L.J.* emphasized the special circumstances of *Gough v. Wood & Co.*, namely, that the fixtures were things brought on the land for the purposes of the mortgagor's business. As to the right to remove fixtures the law is more liberal to a tenant who annexes chattels for the purposes of his trade than to a mortgagor. *Bain v. Brand*, 1876, 1 App. Cas. 762, at p. 772; *Argles v. McMath*, 1896, 23 O.A.R. 44, 26 O.R. 224.

(*v*) See chapter 7, *Equitable Principles governing Priorities*, §61. The equitable principles stated in chapter 7 are subject in their application in Ontario to the provisions of the *Registry Act* (see chapter 8) and of the *Land Titles Act* (see chapter 10).

to the sometime chattel becomes merely equitable in its nature

the right to remove the machinery not being an easement created by deed or not being conferred by a covenant running with the land. If there is already a mortgage on the land the mortgagee, in the absence of an express or implied agreement to the contrary, would be entitled to take possession (*w*) of the machinery as part of his mortgage security (*x*). If, on the other hand, the hire-purchase agreement precedes the mortgage, the question of priority would depend upon whether the mortgage is legal or equitable. If the mortgage is legal and the mortgagee takes without notice of the rights of the unpaid vendor, the mortgagee's claim as purchaser of the legal estate for value without notice will prevail over the earlier equitable claim under the hire-purchase agreement (*y*), but if the mortgage is equitable, then whether or not the mortgagee takes with notice of the earlier equitable claim, he takes subject to it (*z*).

On the same principle, where chattels which were covered by a chattel mortgage duly filed were annexed to the land so as to become fixtures, and the land was subsequently mortgaged to a mortgagee who registered his mortgage in good faith and without actual notice of the prior chattel mortgage, it was held in Ontario that the subsequent mortgagee was entitled to priority over the chattel mortgagee (*a*).

In the case of goods sold under a conditional sale or hire-

(*w*) That is, after default under the mortgage or at such other time as by the mortgage he is entitled to take possession. See chapter 22, *Action for Possession*, §212.

(*x*) *Reynolds v. Ashby*, [1904] A.C. 466; *Ellis v. Glover & Hobson*, *supra*.

(*y*) *Hobson v. Gorringe*, [1897] 1 Ch. 182, 12 R.C. 208.

(*z*) *In re Samuel Allen & Sons*, [1907] 1 Ch. 575; *In re Morrison, Jones & Taylor, Cooke v. Morrison*, [1914] 1 Ch. 50.

(*a*) *Bacon v. Rice Lewis & Son*, 1897, 33 C.L.J. 680, applying *Hobson v. Gorringe*, *supra*.

purchase agreement (*b*). the law of fixtures was, however, altered in Ontario by the provision of the statute 7 E. 7, c. 13, s. 14. which is now contained in the Conditional Sales Act, R.S.O. 1914, c. 136, s. 9, as follows:

9. Where the goods have been affixed to realty they shall remain subject to the rights of the seller or lender as fully as they were before being so affixed, but the owner of such realty or any purchaser or mortgagee or other encumbrancer thereof shall have the right as against the seller or lender or other person claiming through or under him to retain the goods upon payment of the amount owing on them.

§15. *Capacity to make a legal mortgage.*

Generally speaking *nemo dat quod non habet* and only a person having the legal estate and having capacity to transfer property can make a legal mortgage. In order to render the mortgagor personally liable upon the covenants contained in a mortgage he or she must have also the capacity to contract.

All persons under the age of twenty-one years are infants in law. The purchase of land by an infant is voidable at his option, that is, he may disagree thereto within a reasonable time after coming of age, and so may his heir, if he dies while the purchase is still voidable; but it remains good until set aside. The conveyance of land by an infant is, as a rule, similarly voidable (*c*). In England, however, by the effect of the Infants' Relief Act, 1874, the conveyance by an infant of lands or goods by way of mortgage to secure the repayment of money lent to him is absolutely void (*d*). In Ontario the mortgage of an infant would fall within the general rule, that is, it is voidable merely and will be binding on the infant un-

(*b*) Seeley v. Caldwell, 1908, 18 O.L.R. 472; Crane v. Hoffman, 1916, 35 O.L.R. 412.

(*c*) Williams, Real Property, 21st ed., p. 296; cf. Armour, Real Property, 2nd ed., pp. 317-8.

(*d*) Nottingham Permanent Benefit Society v. Thurston, [1903] A.C. 6, [1902] 1 Ch. 1, at pp. 9, 13.

less disaffirmed by him within a reasonable time after his arriving of age (e), but it has been held that a bond, with a penalty, executed by an infant, is void and cannot be ratified by the obligor after his coming of age (f).

§16 *Capacity of married woman.*

At common law a married woman was incapable of conveying land and, as a rule, her contracts were not binding upon her. Statutes were, however, passed at various times conferring upon her the power to convey under certain conditions and to contract with regard to her separate property.

It is now provided in Ontario by the Married Woman's Conveyances Act, R.S.O. 1914, c. 150, s. 3, as follows (g):

3. Subject to the provisions of *The Land Titles Act*, every married woman, being of the full age of twenty-one years, may execute a certificate of discharge of mortgage of land, and may also, by deed, convey her land, and convey, release, surrender, disclaim, or extinguish any interest therein, and release or extinguish any power vested in, or limited or reserved to her in regard to land, and bar or release her dower, and any right or inchoate right of dower in any land, and appoint an attorney for such purposes or any of them as fully and effectually as she could do, if she were a *feme sole*.

It is also provided by the Married Women's Property Act, R.S.O. 1914, c. 149, ss. 4, 5 and 7, as follows (h):

4.-(1) A married woman shall be capable of acquiring, holding and disposing by will or otherwise, of any real or personal

(f) *Foley v. Canada Permanent Loan and Savings Co.*, 1883, 1 O.R. 38.

(g) *Beam v. Beatty*, 22 O.L.R. 554.

(h) Other sections of the statute contain provisions with regard to conveyances executed by married women under earlier statutes. For an account of these statutes, see *Armour, Real Property*, 2nd ed., pp. 319 ff. As to bar of dower, see chapter 18, *Dower*. As to *Curtesy in Mortgaged Land*, §176, and as to the execution of mortgage by a married woman, see chapter 19, *Discharge*, §187.

Other sections of the statute contain provisions with reference to the property of married women under earlier statutes.

property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of a trustee.

(2) A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or legal proceeding brought by or taken against her; and all damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise.

5.—(1) Every contract entered into by a married woman on or after the 13th day of April, 1897, otherwise than as an agent

(a) shall be deemed to be a contract entered into by her with respect to and to bind her separate property whether she was or was not in fact possessed of or entitled to any separate property at the time when she entered into such contract

(b) shall bind all separate property which she may at the time or thereafter possess or be entitled to; and

(c) shall also be enforceable by process of law against all property which she may thereafter while discovert possess or be entitled to.

(2) Nothing in this section shall render available to satisfy any liability or obligation arising out of such contract any separate property which she is restrained from anticipating.

7.—(1) Every married woman, whether married before or after the passing of this Act shall have and hold as her separate property, and may dispose of as such, the wages, earnings, money and property gained or acquired by her in any employment, trade or occupation in which she is engaged or which she carries on and in which her husband has no proprietary interest, or gained or acquired by her by the exercise of any literary, artistic or scientific skill.

(2) Every woman married on or after the first day of July, 1884, shall also be entitled to have and hold and to dispose of as her separate property all other real and personal property belonging to her at the time of marriage or acquired by or devolving upon her after marriage.

It is provided by the Land Titles Act, R.S.O. 1914, c. 126, s. 103, as follows:

1038. A married woman shall for the purposes of this Act be deemed a *fiat sole* and may execute without seal any bar or dowry or other instrument required under this Act.

It appears to be settled that in the case of a mortgage made by a married woman to secure repayment of money loaned to her husband the onus of proving undue influence is upon the married woman and that the mere fact that she has not had independent advice is not sufficient ground for setting aside the transaction (j).

§17. *Capacity of trustee or personal representative.*

It is sometimes said that a trustee cannot sell or mortgage the trust property except under a direction or authority in the trust instrument or under some statutory authority (k). This is, however, misleading language. A trustee who has the legal estate has the same power to convey that estate at law as is possessed by any other owner of the legal estate who has capacity to dispose of property, and that power is not affected

(j) The equitable doctrine of undue influence is of course not related to the question of capacity, but it seems convenient to mention the doctrine here because the question of its application to mortgages and contracts made by married women is of special interest and has been settled only in recent years. The doctrine itself belongs rather to the general law of contracts and is beyond the scope of a book of moderate size on the law of mortgage. A full discussion of the general subject of undue influence will be found in standard works on contracts, e.g., in Pollock on Contracts, 11th ed., pp. 640-681. See also the notes to *Huguenin v. Baseley* in 1 W. & T.L.C. Eq. 278 ff.

(k) *Bank of Montreal v. Stuart*, [1911] A.C. 120, disapproving *Cox v. Adams*, 1904, 35 Can. S.C.R. 393; *Euclid Avenue Trusts Co. v. Hobs*, 1911, 24 O.L.R. 447, 23 O.L.R. 377; *Macdonald v. Fox*, 1917, 39 O.L.R. 261, 35 D.L.R. 198; *Hutchinson v. Standard Bank of Canada*, 1917, 39 O.L.R. 286, 36 D.L.R. 378. As to the question whether a married woman is in a position to exercise free will, see *Johnson v. Clark*, [1908] 1 Ch. 303. As to the plea of *non est factum* by a married woman, see *Morgan v. Dominion Permanent Loan Co.*, 1914, 50 Can. S.C.R. 485, 22 D.L.R. 163, reversing 17 B.C.R. 366, 1 D.L.R. 331.

(k) See, e.g., Underhill, *Law of Trusts*, 7th ed., p. 335.

by the fact that the conveyance is in breach of trust, even if this fact is known to the grantee.* In equity likewise it is recognized that the conveyance or mortgage by the trustee has the effect of vesting the legal estate in the grantee or mortgagee, but it does not follow that the transferee takes free from the equitable rights of the *cestuis que trust*. The trust may be enforced against all persons who take the trust estate by act of law or by gratuitous conveyance from the trustee as his heirs, executors, administrators, devisees, donees and creditors, or against transferees for value with notice of the trust, but not against a person who takes the legal estate for value in good faith and without notice of the trust. This exception to the enforceability of the trust against the property shows that the interest of the *cestui que trust* is not a true right of ownership, enforceable against the land directly, but merely a personal obligation imposed in equity upon the trustee in the first place as legal owner of the land and enforceable against some but not all of the persons who succeed to his estate (1). The alleged lack of power of the trustee to sell or mortgage without a direction or authority in the trust instrument or some statutory authority is not in capacity or true lack of power, because if it were there would be no exception in favor of a purchaser for value in good faith and without notice (m).

As a rule a *cestui que trust* under a trust of land cannot make a legal mortgage without the concurrence of the trustee or other person having the legal estate (n).

It is provided in Ontario by the Devolution of Estates Act, R.S.O. 1914, c. 119, ss. 25, 19, 20 and 21, as follows:

(1) Williams, Real Property, 21st ed., pp. 181, 182; Maitland, Equity and the Forms of Action, pp. 92, 93.

(m) See chapter 7, *Equitable Principles governing Priorities*.

(n) See chapter 5, *Equitable Mortgages*, §43.

§17. POWERS OF PERSONAL REPRESENTATIVE. 29

25.—(1) The powers of a personal representative under this Act (o) shall include

(c) Power to mortgage for the payment of debts.

(2) The written approval of the Official Guardian to mortgaging shall be required where it would be required if the real property were being sold (p).

19.—(1) Where an infant is interested in real property which but for this Act would not devolve on the personal representative (q), no sale or conveyance shall be valid under this Act without the written approval of the Official Guardian appointed under the *Judicature Act*, or, in the absence of such consent or approval, without an order of a Judge of the Supreme Court (r).

20. Except as herein otherwise provided the personal representative of a deceased person shall have power to dispose of and otherwise deal with the real property vested in him by virtue of this Act, with the like incidents, but subject to the like rights, equities and obligations, as if the same were personal property vested in him (s).

21.—(1) The powers of sale conferred by this Act on a personal representative may be exercised for the purpose not only of

(o) As to the sections of the statute providing for the vesting of the real property of a deceased person in his personal representatives, see chapter 13, *Persons entitled on Death of the Mortgagee*, §123.

(p) As to the cases in which the consent of the Official Guardian is required, see s. 19 of the statute. In view of the provisions of ss. 20 and 21, it would appear that the concurrence of adult beneficiaries in a mortgage "for payment of debts" is not necessary.

(q) If, e.g., land is devised to the executor upon trust to sell, the executor takes independently of the statute and the consent of the Official Guardian to a sale would not be necessary. So if lands are held by two or more persons as partnership assets, on the death of one partner his interest in the land devolves upon his personal representative *virtute officii* and not by virtue of the statute, and consequently the consent of the Official Guardian to a sale by the personal representative is not necessary. *Re Fulton and McIntyre*, 1904, 7 O.L.R. 445.

(r) Sub-s. 2 makes provision for the appointment of local guardians of infants in outer counties. As to an order of a judge in lieu of the consent or approval of the Official Guardian, see *Bélanger v. Bélanger*, 1911, 24 O.L.R. 439.

(s) This section confers the power to sell for payment of debts without the concurrence of the beneficiaries. *Re Ross and Davies*, 1904, 7 O.L.R. 433.

paying debts, but also of distributing or dividing the estate among the persons beneficially entitled thereto, whether there are or are not debts, and in no case shall it be necessary that the persons beneficially entitled shall concur in any such sale except where it is made for the purpose of distribution only (1).

It is provided by the Trustee Act, R.S.O. 1914, c. 121, ss. 44, 45 and 47, as follows:

44. Where there is in a will a direction, express or implied, to sell, dispose of, appoint, mortgage, encumber or lease any land, and no person is by the will or otherwise by the testator appointed to execute and carry the same into effect, the executor, if any, named in such will may execute and carry into effect every such direction in respect of such land, and any estate or interest therein in the same manner and with the same effect as if he had been appointed by the testator for that purpose.

45. Where from any cause a court of competent jurisdiction has committed to a person, who has given security to the satisfaction of such court for his dealing with such land and its proceeds, letters of administration with a will annexed which contains an express or implied power to sell, dispose of, appoint, mortgage, encumber or lease any land, whether such power is conferred on an executor named in the will or the testator has not by the will or otherwise appointed a person to execute it, the administrator may exercise the power in respect of such land in the same manner and with the same effect as if he had been appointed by the testator for that purpose.

(1) The other sub-sections make provision as to the consent of the persons beneficially interested in the case of a sale for the purpose of distribution only. As to the power of the Official Guardian to consent on behalf of non-concurring heirs or devisees, see *In re Bradley's Estate*, 1903, 6 O.L.R. 397. The section is intended to make it clear that personal representatives have power to sell for purposes of distribution where there are no debts as well as where there are debts, and the consent of the beneficiaries is not necessary unless the sale is for purposes of distribution only. *Re Ross and Davies*, 1904, 7 O.L.R. 133. The original of this section was 54 V. c. 18, s. 2, passed in 1891, which provided that where infants are entitled "and there are no debts," the approval of the Official Guardian should be necessary. The inconsistency of this section with the predecessor of the present s. 19 was pointed out in *Re Fletcher's Estate*, 1895, 26 O.R. 499, at p. 504. In 1900 by 63 V. c. 17, s. 17, the words "and there are no debts" were struck out. In 1913 the section was revised and put in its present form.

47.—(1) Subject to the provisions of *The Devolution of Estates Act* where, by any will coming into operation after the eighteenth day of September, 1865, a testator charges his land, or any specific part thereof, with the payment of his debts or with the payment of any legacy or other specific sum of money, and devises the land so charged to a trustee for the whole of his estate or interest therein, and does not make any express provision for the raising of such debt, legacy or sum of money out of such land, the devisee in trust, notwithstanding any trusts actually declared by the testator, may raise such debt, legacy or money by a sale and absolute disposition, by public auction or private contract, of such land or any part thereof, or by a mortgage of the same, or partly by one mode and partly by the other, and in any mortgage so executed may agree to such rate of interest and such period of repayment as he may think proper.

(2) The powers conferred by this section shall extend to every person in whom the land devised is for the time being vested by survivorship, descent or devise, and to any person appointed under any power in the will or by the Supreme Court to succeed to the trusteeship vested in such devisee in trust.

(3) If a testator who creates such a charge does not devise the land so charged in such terms that his whole estate and interest therein become vested in a trustee the executor for the time being named in the will, if any, shall have the like power of raising money as is hereinbefore conferred upon the devisee in trust; and such power shall from time to time devolve upon and become vested in the person in whom the executorship is for the time being vested.

(4) Any sale or mortgage under this section shall operate only on the estate and interest of the testator.

(5) Purchasers or mortgagees shall not be bound to inquire whether the powers conferred by this section, or any of them, have been duly and correctly exercised by the person acting in virtue thereof.

(6) This section shall not extend to a devise to any person in fee or in tail, or for the testator's whole estate and interest charged with debts or legacies, or affect the power of any such devisee to sell or mortgage (u).

Where a testatrix, after a direction to pay her debts, devised land to her executor and trustee and his executors and administrators, upon trust to retain for his own use for life,

(u) See *Re Ross and Davies*, 1904, 7 O.L.R. 433. S. 47 is a consolidated and revised edition of R.S.O. 1897, c. 129, ss. 16 to 20, which were a copy of the English statute 22-23 V. c. 35, ss. 14 to 18. For a full discussion of the statute, see *Farwell on Powers*, 3rd ed., pp. 99 ff.; *Armour, Devolution of Land*, pp. 280 ff.

and directed that after his decease his executors or administrators should sell the land and divide the proceeds among her children, it was held that this was a devise of the land out and out as to the legal estate, and the words "his executors and administrators" being equivalent to "heirs and assigns" the executor had the right by virtue of the Trustee Act to mortgage the entire fee for debts; and that the mortgagee in such a mortgage, made within eighteen months of the death, was exonerated from all enquiry (v). The Devolution of Estates Act does not apply to a case where the executor derives his title to the land from, and acts under the will and the provisions of the Trustee Act (w).

The devisee of real estate under the will of a testator subject to the Devolution of Estates Act has a transmissible interest in the lands during the three years after the death of the testator, pending which time they are vested by the act in the legal personal representatives. Where real estate devised by a will so subject to the Devolution of Estates Act, of which letters of administration with the will annexed had been granted during the three years succeeding the testator's death, but as to which no caution had ever been registered, was during such period mortgaged by the devisee in good faith, it was held that the mortgage was operative between the devisee and the mortgagee when made, and became fully so as to the land and against the personal representatives when such period expired, in the absence of any warning that it was needed for their purposes (x).

It is provided by the Settled Estates Act, R.S.O. 1914 71, as follows:

(v) *Mercer v. Neff*, 1898, 29 O.R. 680, following *In re Bailey*, *Bailey v. Bailey*, 1879, 12 Ch.D. 268; *In re Tanqueray-Williamson and Landau*, 1882, 20 Ch.D. 476.

(w) *Mercer v. Neff*, 1898, 29 O.R. 680.

(x) *Re McMillan*, *McMillan v. McMillan*, 1893, 24 O.R. 181. Ac

2.—(1) In this Act

(a) "Court" shall mean the Supreme Court.

(c) "Settled estate" shall mean land and all estates or interests in land which are the subject of a settlement.

(f) "Settlement" shall mean a statute, deed, agreement, will or other instrument, or any number of such instruments, under and by virtue of which land or any estate or interest in land stands limited to or in trust for any persons by way of succession, including any such instruments affecting the estate of any one or more of such persons exclusively.

14.—(1) The Court, if it deems it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in this Act (y), may

(a) from time to time authorize a mortgage of the whole or any part of any settled estate for the purpose of raising money to repair, build or alter any existing building upon the estate, or otherwise to build upon or improve the same; or for the purpose of raising money to pay off and discharge wholly or in part any encumbrance thereon.

(2) Such mortgage shall be authorized wherever the Court is of opinion that the interests of the estate or any part thereof or of the persons entitled to the estate or any part thereof require, or will be promoted by such mortgage (z).

§18. *Consideration.*

The mere existence of an antecedent debt is not valuable consideration for a security given by the debtor (a). "It

to the vesting of the lands in the personal representatives for three years after the owner's death, see chapter 13, §123.

(y) Subsequent sections of the statute contain some limitations on the power of the court, as well as provisions with regard to the procedure on the application for an order and with regard to the manner of carrying out the transaction.

(z) As to the apportionment of the burden of expenditure as between the beneficiaries, see *Re Elliott*, 1917, 41 O.L.R. 276, 40 D.L.R. 649, and cases cited.

(a) It is beyond the scope of this book to discuss the general doctrine of consideration, which is fully dealt with in any standard work on contracts, but inasmuch as a mortgage is frequently taken with respect to an existing indebtedness it seems advisable to refer

appears to me to be reasonably clear that the mere existence of a debt from A to B is not sufficient valuable consideration for the giving of a security from A to B to secure the debt. If such a security is given, it may of course be given upon some express agreement to give time for the payment of the debt, or to give consideration for the security in some other way, or, if there be no express agreement, the law may very readily imply an agreement to give time. It may not be a definite time, but to forbear for some indefinite time in consideration of the security being given. And further than that, if there is no express agreement, and no agreement can be implied at the time and under the circumstances at and under which the indenture giving the further security is executed, yet if that security be communicated to a person who could otherwise sue on the debt, and on the strength of that security he does in fact forbear to sue on the debt, he does give that time with the object of securing which the security is presumably given, and then I think it appears on the cases that there is sufficient consideration, though in a sense it is an *ex post facto* consideration, for the security which is given. On the other hand, it appears to me that where there is no communication of the security, where there is no express agreement, and there are no circumstances from which the Courts can imply any agreement, then there is no possibility of its being said with any justice that any consideration has been given at all." (b).

Even though the right of action on the alleged indebtedness is not admitted, forbearance to sue in consideration of security being given may be sufficient. "If a man *bona fide*

to this particular aspect of the doctrine. In the case of a mortgage taken for a present or future advance there will usually be no question as to the validity of the consideration.

(b) *Wigan v. English and Scottish Law Life Assurance Association*, [1909] 1 Ch. 291, *Parker J.* at pp. 297-298, and cases cited at pp. 298 ff: cf. *Johnston v. Reid*, 1881, 29 Gr. 293.

believes he has a fair chance of success, he has a reasonable ground for suing, and his forbearance to sue will constitute a good consideration" (c).

(c) *Callisher v. Bischoffsheim*, 1870, L.R. 5 Q.B. 449, Cockburn C.J., at p. 452; *Miles v. New Zealand Alford Estate Co.*, 1886, 32 Ch.D. 266; *Drewry v. Percival*, 1909, 19 O.L.R. 463.

CHAPTER III.

LEGAL MORTGAGE IN EQUITY.

- §21. Mortgage regarded as security merely, p. 36.
- §22. Equitable right to redeem and the correlative right to foreclose, p. 37.
- §23. A mortgage cannot be made irredeemable, p. 41.
- §24. Once a mortgage always a mortgage, p. 42.
- §25. Stipulation for a collateral advantage, p. 43.
- §26. Clogging the equity of redemption, p. 45.
- §27. Disguised forms of mortgage, p. 51.
- §28. Nature of the equity of redemption, p. 52.
- §29. How the equity of redemption may be barred or extinguished, p. 55.

§21. *Mortgage regarded as security merely.*

Although the courts of law construed a mortgage strictly as conferring upon the mortgagee a conditional estate in the land (*a*) they did not entirely lose sight of the fact that the substantial purpose of the transaction was merely to give a security to the mortgagee.

Littleton points out that if the mortgagor dies before the day fixed for payment, the duty to pay the debt may be discharged by his *executors*, and if the mortgagee dies before the day the money should be paid to his *executors*, and not to his heir, unless the heirs are named (*b*). Till the time fixed for redemption has expired the mortgagee's estate is clearly

(*a*) See chapter 2, *Mortgage at Common Law*, §12.

(*b*) Litt. Ten. ss. 337, 339; Co. Litt. 208a, 209b. If both heirs and executors were named disjunctively and the mortgagor paid the money precisely on the day, he might elect to pay it to the heir or executor as he pleased. *Thornborough v. Baker*, 1677, 3 Swanst. 628, at p. 629, 18 R.C. 231, at p. 232.

regarded as simply a security for money lent, which money can be paid by and should be received by the executors and not by the heir. The idea bore much fruit when, after the legal time for redemption had expired, the Court of Chancery recognized an equity of redemption (c).

In *Thornbrough v. Baker* (d) in Chancery in 1677 it was held that if the mortgagor's estate had been forfeited at law by reason of his failure to pay on the day named in the mortgage, and the mortgagee was dead, the money was payable to the executor, not to the heir, even though the heirs were named in the contract. In such a case the contractual right of the mortgagor to pay the heir instead of the executor was forfeited. The mortgagee's right to the land was in essence merely a right to a security for money and the money when paid was part of his personal estate. Consequently the heir was bound to reconvey on payment to the executor. It has long been settled that the mortgage security is personal estate (e).

§22. *Equitable right to redeem and the correlative right to foreclose.*

Equity carried to its logical conclusion the principle that the mortgage transaction was in essence merely the giving of security, by incorporating in the contract certain inevitable terms which were not in accordance with the language of the contract and which the parties to the contract could neither

(c) Holdsworth, *History of English Law*, vol. 2, p. 491; cf. Strahan, *Law of Mortgages*, 2nd ed., 19, 20.

(d) 1 Cas. in Ch. 283, 2 W. & T.L.C. Eq. 1; s.c. *sub nom.* *Thornbrough v. Baker*, 3 Swanst. 628, 18 R.C. 231, 2 Freeman 143.

(e) 21 Halsbury, *Laws of England*, p. 182, note (q). As to the heir's title to the legal estate and the present law in Ontario with regard to the devolution of the mortgagee's interest, see chapter 13, *Persons Entitled on Death of the Mortgagee*.

dispense with nor modify (*f*). One of these terms was that after the mortgagor's estate had become forfeited at law, equity would relieve against the forfeiture and allow him to redeem (*g*), or, in other words, would give him an equitable right to redeem after his contractual right was gone. In substance it is obvious that this equitable rule is more just than the legal rule according to which, no matter how valuable the estate was in comparison with the debt secured, the estate was forfeited on default in payment exactly on the day (*h*). In point of form the equitable rule is objectionable because it contradicts the language of the mortgage whereas the legal rule is in agreement with the language. "That is the worst of our mortgage deed—owing to the action of equity, it is one long *suppressio veri* and *suggestio falsi*." (*i*) It is

(*f*) Ashburner, *Principles of Equity*, 258 ff. In a modern mortgage it is customary to insert special contractual provisions, such as a power of sale, a right to distrain, etc., and, such provisions are binding in so far as they are consistent with the "inevitable terms" incorporated by equity in the mortgage transaction.

(*g*) Cf. *Kreglinger v. New Patagonia, etc., Co.*, [1914] A.C. 25, at p. 35.

(*h*) H. D. Hazeltine in *Die Geschichte des englischen Pfandrechts* (Breslau, 1907), p. 249, refers to some passages in the old dramatists as showing that the harshness of the common law rule as to forfeiture on default was not in accord with the public sentiment as to what was just and that the mortgagee who took advantage of the forfeiture might have qualms of conscience. From Fletcher's *The Night Walker or Little Thief*:

Alathe. Thou hast undone a faithful gentleman,

By taking forfeit of his land.

Algripe.—I do confess. I will henceforth practise repentance

I will restore all mortgages, forswear abominable usury.

From the *Three Ladies of London* (1584):

Simplicity. O that vile Usury! he lent my father a little money;
and for breaking one day,

He took the fee-simple of his house and will quite away;

And yet he borrowed not half a quarter as much as it
cost;

But I think, if it had been a shilling, it had been loste;

So he killed my father with sorrow and undoe'd me quite.

(*i*) Maitland, *Equity and the Forms of Action*, p. 269.

"an instrument which perhaps lends itself to imposition—for no one, I am sure, by the history of nature ever understood an English mortgage of real estate." (j)

The following remarks of Lord Bramwell are quoted with mental reservations

"Of course, or in a general if not in a critical way, what is an equity of redemption is not given by the terms of the agreement between the parties to it but contrary to them, to have back security by a borrower to a lender. I suppose one may say by a debitor, on payment of principal and interest, at a day appointed for payment, when by the terms of the agreement the parties the securities were to be the absolute property of the creditor. This is now a legal right in the debitor. Whether it could not have been better to have held people to their bargains and taught them by experience not to make unwise ones, rather than to give them when they have done so, may be doubtful. We should have been told the doctrine condition of things, legal rights and equitable rights, and the terms of documents which do not mean what they say. But the pity or love of fees of those who administer equity has brought it otherwise. And probably to undo this would be more costly and troublesome than to continue it." (k)

As already seen, the Chancery recognized the legal title. In equity as in common law, the mortgagee became the absolute legal owner on the mortgagor's default in payment, but the Court of Chancery, *in personam* would compel the mortgagee upon the terms to reconvey the land to the mortgagor and if the mortgagee had already taken possession, would compel him to account for rents and profits received (l).

It was only through intermediate stages that the Court of Chancery reached the final result, namely, that in every case forfeiture would be relieved against in equity unless there

(j) *Samuel v. Jarrah Timber and Wood Paving Corporation*, [1904] A.C. 323, Lord Macnaghten at p. 326.

(k) *Salt v. Marquess of Northampton*, [1892] A.C. 1, at pp. 18-19.

(l) As to the latter case, see chapter 28, *Mortgages in Possession*.

existed some equitable ground for refusing relief (*m*). Littleton, in the fifteenth century, has nothing to say about an equity of redemption, although in at least one case as early as 1456 Chancery gave relief under a feoffment by way of mortgage and a bond to secure payment where the mortgagee fraudulently sought to enforce the bond (*n*). Coke likewise, in his Commentary upon Littleton, has nothing to say about an equity of redemption, but in his day, in the early part of the seventeenth century, it had become the practice in Chancery to allow a mortgagor to redeem after default in special circumstances, for instance, if the period of default was short and the default was occasioned by accident or fraud (*o*). So at a comparatively early date Chancery allowed redemption after default in the case of a person who had made a mortgage as surety merely, because in that case until after the principal debtor had made default the mortgagor would not know whether he would be called upon to pay at all (*p*).

In the reign of Charles I the right to redeem equity was fully recognised, even in the absence of special circumstances (*q*).

Conversely Chancery admitted the right of a mortgagee, after the mortgagor had made default at law, to come into a court of equity and insist that the mortgagor should either

(*m*) See §28, *infra*.

(*n*) Select Cases in Chancery (Selden Society, vol. 16, 1896), case 141.

(*o*) In *Couriman v. Conyers*, 1600, Acta Cancellariae, 764, the mortgagee was alleged to have purposely absented himself on the day fixed for redemption, in order to avoid receiving payment. In other words, it was a case of fraud. Jenks, *Short History of English Law*, 219.

(*p*) Hazeltine, *op. cit.*, 252, 253; Spence, *Equitable Jurisdiction*, vol. 1, 602, 603; Williams, *Real Property*, 21st ed., 546, 547.

(*q*) *Emmanuel College v. Evans*, 1625-6, 1 Rep. in Ch. 18; *Well-den v. Rallison*, 1656, 1 Rep. in Ch. 171.

exercise his equitable right to redeem within a reasonable time or be forever precluded from exercising it (*r*).

"A bill of foreclosure (it is an action now) never gave and never was intended to give the mortgagee any active remedy. A bill of foreclosure in substance was this: 'You have a right to redeem and you may exercise that right at any time within twenty years (*s*), according to the usual practice of the court, but I do not want to be kept in a state of uncertainty as to whether I am or am not to be redeemed, and therefore if you want to redeem me, redeem me now.' And the mortgagee has a right to say: 'Redeem me upon those terms upon which you would be entitled to redeem if you filed your redemption suit.' That is all. If you do not redeem your equity of redemption is gone; the only result, therefore, of a bill for foreclosure is to deprive a man of his opportunity of filing a bill of redemption at some future time." (*t*)

§23. *A mortgage cannot be made irredeemable.*

When the right of redemption after default became established, the Court of Chancery, in order to prevent its evasion, was obliged to hold that a mortgagor could not by any agreement entered into at the time of the mortgage and as part of the mortgage transaction contract away his right of redemption or fetter it in any way by confining it to a particular time or to a particular class of persons (*u*). The principle upon which the court interfered with the contract of the parties was, however, not a rigid one. The equity judges looked not

(*r*) *Hew v. Vigures*, 1628-9, 1 Rep. in Ch. 32. As to the right to foreclose, see further chapter 24, *Action for Foreclosure or Sale*, §231.

(*s*) The period is now ten years in Ontario, twelve years in England. See chapter 26, *Limitation of Actions*, §277.

(*t*) *Cummins v. Fletcher*, 1880, 14 Ch.D. 699, at p. 708. The passage quoted occurs in a judgment relating to the mortgagee's right of consolidation. See chapter 9, *Consolidation and Tacking*, §81.

(*u*) *Mellor v. Lees*, 1742, 2 Atk. 494. "It seems that a borrower was such a favourite with courts of equity that they would let him break his contract, and, perhaps, by disabling him from binding himself, disable him from contracting on the most advantageous terms to himself." *Salt v. Marquess of Northampton* [1892] A.C. 1. Lord Bramwell, at p. 19.

at what was technically the form, but at what was really the substance of transactions, and confined the application of their rules to cases in which they thought that in its substance the transaction was oppressive. Thus, in *Howard v. Harris (v)* Lord Keeper North in 1683 set aside an agreement that a mortgage should be irredeemable after the death of the mortgagor and failure of the heirs of his body, on the ground that such a restriction of the right to redeem was void in equity, but he intimated that if the money had been borrowed by the mortgagor from his brother, and the former had agreed that if he had no issue the land should become irredeemable, equity would not have interfered with what would really have been a family arrangement. The exception thus made to the rule, in cases where the transaction includes a family arrangement as well as a mortgage, has been recognised in later authorities (*w*).

§24. *Once a mortgage always a mortgage.*

The principle that a mortgage could not be made irredeemable was thus limited in early days to the accomplishment of the end which was held to justify interference by equity with freedom of contract. It did not go further (*x*). As established it was expressed in three ways. The first and most general rule was that if the transaction is once found to be a mortgage, it must be treated as always remaining a mortgage and nothing but a mortgage—"once a mortgage always

(*v*) 1683, 1 Vern. 190, 2 W. & T.L.C. Eq. 11, 18 R.C. 358.

(*w*) *Kreglinger v. New Patagonia, etc., Co.*, [1914] A.C. 25, at p. 36; *Stapilton v. Stapilton*, 1739, 1 Atk. 2, 1 W. & T.L.C. Eq. 234; cf. 2 W. & T.L.C. Eq. 19.

(*x*) The leading case with regard to the principle under discussion is the case of *Kreglinger v. New Patagonia, etc., Co.*, [1914] A.C. 25; see especially the judgment of Lord Parker of Waddington. See also on the general subject the notes in 2 W. & T.L.C. Eq. 15 ff to the case of *Howard v. Harris*, *supra*.

a mortgage"—and is therefore redeemable notwithstanding any agreement to the contrary (*y*).

It was only a different application of the paramount principle to state in the form of a second rule that a mortgagee should not stipulate for a collateral advantage which would make his remuneration for the loan exceed a proper rate of interest (*z*). The third form in which the principle was stated was that any stipulation which restricts or clogs the equity of redemption is void (*a*).

§25. *Stipulation for a collateral advantage.*

The second rule, which prohibited a mortgagee from stipulating for a collateral advantage, was founded upon the statutes against usury. A stipulation of this kind was in equity held void as being contrary to the spirit of these statutes (*b*). The rule was by its nature confined to mortgages to secure the repayment of borrowed money, and the stipulation was void *ab initio* on the ground of supposed pub-

(*y*) A modern case in which it was attempted virtually to make a mortgage irredeemable is *Fairclough v. Swan Brewery Co.*, [1912] A.C. 565. A clause in a mortgage of a lease for twenty years provided that without the mortgagee's written consent the mortgage debt should not be wholly paid off till a date within six weeks of the expiration of the lease. It was held that the mortgagor was entitled to redeem. Cf. *Manitoba Lumber Co. v. Emmerson*, 1913, 18 B.C.R. 96, 14 D.L.R. 390.

(*z*) See §25.

(*a*) See §26.

(*b*) Throughout the period in which the Court of Chancery was formulating its doctrines in relation to mortgages there were in force in England statutes limiting the rate of interest which could be legally charged for money lent. The last of these usury laws was repealed in 1854 by the statute 17 & 18 V. c. 90. The leading case as to a stipulation for a collateral advantage was formerly that of *Jennings v. Ward*, 1705, 2 Vern. 520, 18 R.C. 365, in which Sir J. Trevor, M.R., said: "A man shall not have interest for his money and a collateral advantage besides for the loan of it, or clog the redemption with any by-agreement." Cf. the notes in 2 W. & T.L.C. Eq. 23 ff. to the case of *Howard v. Harris*, 1683, 1 Vern. 190.

lie policy. The rule had nothing to do with an equity of redemption based on relief against forfeiture, because it was enforceable before as well as after default. Since the repeal of the usury laws there is no reason why mortgages to secure loans should be on any different footing from other mortgages or why the old rule against a mortgagee's stipulating for a collateral advantage should be maintained in any form or with any modification. The right (notwithstanding the stipulation) to redeem on payment merely of principal, interest and costs is a mere corollary of the rule and falls with it (c).

In every case in which a stipulation by a mortgagee for a collateral advantage has, since the repeal of the usury laws, been held invalid, the stipulation has been open to objection, either (1) because it was unconscionable, or (2) because it was in the nature of a penal clause clogging the equity arising on failure to exercise a contractual right to redeem, or (3) because it was in the nature of a condition repugnant as well to the contractual as to the equitable right (d).

In other words, a provision in favour of a mortgagee is not invalid merely because he thereby stipulates for a collateral advantage. Accordingly, if there is nothing unfair or oppressive in the bargain, in a mortgage of a hotel to a brewer the mortgagee may stipulate that the mortgagor shall during the continuance of the security deal exclusively with the mortgagee for all beer and malt liquors sold on the mortgaged premises (e); in a mortgage of the lease of a theatre—a notoriously

(c) Lord Parker of Waddington in *Kreglinger v. New Patagonia, etc., Co.* [1914] A.C. 25, at pp. 54-55.

(d) 8 C. [1914] A.C. at p. 56. See, e.g., *James v. Kerr*, 1888, 19 Ch.D. 449 (agreement for bonus voidable as an undue advantage obtained from mortgagor under the pressure of distress and in a position analogous to that of an expectant heir).

(e) *Biggs v. Hoddinott*, [1898] 2 Ch. 307; *Noakes & Co. v. Rice*, [1902] A.C. 24, at p. 33; *Kreglinger v. New Patagonia, etc., Co.* [1914] A.C. 25, at p. 38.

risky security- the mortgagee may stipulate for a share in the profits of the theatre (*f*); and when money is lent on a security of a speculative or unsatisfactory nature, the mortgagee may, as part of the mortgage transaction, stipulate for the deduction by him from the amount of the advance or for the payment by the mortgagor of a bonus or commission in addition to the interest payable under the mortgage (*g*).

§26. *Clogging the equity of redemption.*

There remains the third rule, that any stipulation which restricts or clogs the equity of redemption is void, or, as stated more broadly, that any provision which is repugnant either to the contractual or to the equitable right to redeem is void. A condition that if the contractual right is not exercised by the time specified the mortgagee shall have an option of purchasing the mortgaged property may properly be regarded as a penal clause, and it may be relieved against (*h*). It is repugnant only to the equitable and not to the contractual right. But

(*f*) *Santley v. Wilde*, [1899] 2 Ch. 474; 16 L.Q.R. 7, 113 (Jan., April, 1900). The correctness of this decision has been called in question because in the mortgage it was provided that the share in the profits of the theatre was to be paid until the end of the leasehold term, and not merely during the existence of the mortgage: *Noakes & Co. v. Rice*, [1902] A.C. 24, at pp. 31, 34. But see *Kreglinger v. New Patagonia, etc., Co.*, [1914] A.C. 25, at p. 56.

(*g*) *Potter v. Edwards*, 1857, 26 L.J.Ch. 468; *Marquess of Northampton v. Pollock*, 1890, 45 Ch.D. 190, at p. 212 (S.C. *sub nom.* *Salt v. Marquess of Northampton*, [1892] A.C. 1); *Eyre v. Wynn-Mackenzie*, [1894] 1 Ch. 218, at p. 227; *Gardiner v. Munro*, 1896, 28 O.R. 375; *Farrell v. Caribou Gold Mining Co.*, 1897, 30 N.S.R. 199; *Buchanan v. Harvie* (No. 2) 3 N.B. Eq. 61. The distinction drawn in *Phillips v. Prout*, 1898, 12 M.R. 143, between a bonus or commission agreed to be paid and one which is deducted at the time of the advance or afterwards paid by the mortgagor does not seem to be well founded. As to the costs which a mortgagee may charge against the mortgagor, see chapter 30, *Costs*.

(*h*) *Vernon v. Bethell*, 1762, 2 Eden 110, at p. 113; *Fallon v. Keeman*, 1866, 12 Gr. 388; *Arnold v. National Trust Co.*, 1912, 5 A.L.R. 211, 7 D.L.R. 754.

a condition that the mortgagee is to have such an option for a period which begins before the time for the exercise of the equitable right has arrived, or which reserves to the mortgagee any interest in the property after the exercise of the contractual right, is inconsistent not only with the equitable but with the contractual right itself, and might perhaps be held invalid for repugnancy even in a court of law (i). "It is the right of a mortgagor on redemption, by reason of the very nature of a mortgage, to get back the subject of the mortgage, to hold and enjoy as he was entitled to hold and enjoy it before the mortgage. If he is prevented from doing so, that which he is entitled to on redemption is prevented, and to constitute such prevention it is not necessary that the subject of the mortgage should be directly charged with whatever causes the prevention. If he be so prevented in fact, the equity of redemption is affected by what, whether very aptly or not, has been always termed 'a clog' " (j).

In *Noakes & Co. v. Rice* (k) a mortgage of a leasehold public-house by a licensed victualler to brewers contained a covenant by the mortgagor that he and all persons deriving title under him should not during the continuance of the leasehold term, and whether any money should or should not be owing on the mortgage, use or sell in the house any malt liquors except such as should be purchased from the mortgagees. It was held that this covenant was a "clog" on the equity of redemption, and that the mortgagor, on payment of all that was owing on the security, was entitled to have a re-

(i) *Kreglinger v. New Patagonia, etc., Co.*, [1914] A.C. 25, at p. 50.

(j) *Browne v. Ryan*, [1901] 2 I.R. 653, *Andrews, J.*, at pp. 667, 668, quoted with approval and adopted by *Collins, M.R.*, in *Jarrah Timber and Wood Paving Corporation v. Samuel*, [1903] 2 Ch. 1, at p. 7 (S.C. [1904] A.C. 323, *sub nom.* *Samuel v. Jarrah, etc.*); cf. *Strahan, Law of Mortgages*, 2nd ed., 29 ff.; notes in 2 W. & T.L.C. Eq. 90 ff. to *Howard v. Harris*, 1683, 1 Vern. 190.

(k) [1902] A.C. 24.

conveyance of the property, or at his option a transfer of the security, free in either case from the tie (l).

In *Bradley v. Carritt* (m) the holder of the majority of shares of a company mortgaged his shares as security for an advance of money and at the same time covenanted that he would always thereafter use his best endeavors to secure that the mortgagee should be employed as a broker for the sale of the company's teas and that, in the event of any of such teas being sold otherwise than through the mortgagee, the mortgagor should pay to the mortgagee the commission which the mortgagee would have earned if the teas had been sold through him. The mortgage was paid off and the company changed its broker. The quondam mortgagee brought an action against the mortgagor for breach of the covenant. The House of Lords held by a majority of three to two, reversing the Court of Appeal, that the covenant was invalid because, although it did not operate *in rem* or as a charge on the shares, its effect was permanently to fetter the mortgagor in the free enjoyment and disposition of the shares. The true ground of the decision was that the covenant was repugnant to the contractual as well as the equitable right of the mortgagor on redemption to get his property back intact (n).

(l) But the opinion of Lord Davey at p. 34 that the mortgagee cannot stipulate for any payment which is to fall due after the principal is repaid is dissented from by Lord Parker of Waddington in *Kreglinger v. New Patagonia, etc., Co.*, [1914] A. C. 25, at p. 58, as being the reassertion in a modified form of the rule against stipulating for a collateral advantage which prevailed prior to the repeal of the usury laws. See also Pollock's observations in 16 L.Q.R. 113, 322, (April, October, 1900).

(m) [1903] A.C. 253.

(n) There was room for difference of opinion on the question whether the repugnancy existed in fact, but the dicta expressed by Lord Macnaghten and Lord Davy that a stipulation for a collateral advantage to endure after redemption is necessarily invalid are dissented from in *Kreglinger v. New Patagonia, etc., Co.*, [1914] A.C. 25, at pp. 43, 60.

In *Samuel v. Jarrah Timber and Wood Paving Corporation* (*o*) certain debenture stock was transferred as security for an advance. The loan was repayable on thirty days' notice on either part and the mortgagor agreed that the mortgagee at any time within twelve months of the date of the advance should have the privilege of purchasing the stock at 40% of the face value. The option being inconsistent with both the contractual and the equitable right of redemption was held to be invalid (*p*).

The decision in *DeBeers Consolidated Mines v. British South Africa Co.* (*q*) really turned on the facts. It was held that the stipulation for the mining license there in question was not part of the mortgage transaction and therefore was not a clog on the equity of redemption. The further question was raised, but not decided, whether the general principles of equity with regard to the right to redeem apply in their integrity to mortgages by way of floating charge. A similar question was raised, but not decided, in the important case of *Kreglinger v. New Patagonia Meat and Cold Storage Co.* (*r*). In this case the paramount doctrine that a mortgagor cannot at the time of the mortgage and as part of the mortgage transaction contract away his right to redeem and the subsidiary rules in which that doctrine has been expressed were subjected to a fresh and illuminating discussion by Lord

(*o*) [1904] A.C. 323

(*p*) See *Kreglinger v. New Patagonia, etc., Co.*, [1914] A.C. 25, at p. 60. Although the case was a clearer one than either *Noakes & Co. v. Rice* or *Bradley v. Carritt*, it was an extreme one in that a company with a board of directors composed of experienced men of business, advised by a competent solicitor, after it had invited a loan and settled considered terms, was permitted to repudiate its own bargain deliberately entered into in its own interests. See *Pollock* in 19 L.Q.R. 359 (Oct. 1903)

(*q*) [1912] A.C. 59

(*r*) [1914] A.C. 25.

Haldane and Lord Parker of Waddington (s). By an agreement dated the 24th of August, 1910, a firm of wool brokers agreed to lend to a company carrying on the business of meat preservers a sum of £10,000 at 6%. If the interest was punctually paid the loan was not to be called in until the 30th of September, 1915, but the company might pay off at any time on giving one calendar month's notice. The loan was secured by a floating charge on the undertaking of the company. The agreement provided that for a period of five years from the date thereof the company should not sell sheepskins to any person other than the lenders so long as the latter were willing to buy at the best price offered by any other person and that the company should pay to the lenders a commission on all sheepskins sold by the company to any other person. The loan having been paid off by the company in January, 1913, in accordance with the agreement, the lenders claimed the right to exercise their option of pre-emption notwithstanding the payment of the loan. The House of Lords, reversing the Court of Appeal, held that the stipulation for the option of pre-emption formed no part of the mortgage transaction, but was a collateral contract entered into as a condition of the obtaining of the loan by the company; that it was not a clog on the equity of redemption or repugnant to the right to redeem; and that the lenders were entitled to an injunction restraining the company from selling sheepskins, in breach of the agreement, to any person other than the lenders.

Where a loan is obtained from an insurance company on the security of a mortgage, and at the same time the mortgagor takes from the same company a policy of insurance on his life, and by the mortgage the borrower assigns the policy as collateral security for the payment of the loan, covenants to pay

(s) As the judgments in this case have been made the chief basis for the discussion of the doctrine contained in the foregoing pages, it is sufficient here simply to state the decision.

the premiums and the mortgage and agrees that the premiums shall be a charge upon the lands, it has been held that the charging of the premiums on the land does not constitute a clog on the equity of redemption, but that the covenant to pay premiums is void after the redemption of the mortgage or after payment of all debts secured by it (*t*).

Where money is advanced on a mortgage of a reversionary interest, and is collaterally secured by a policy of life insurance effected by the creditor in the name of the debtor, the question has frequently arisen whether the policy belongs to the creditor absolutely or is redeemable by the representatives of the debtor (*u*). The result of the decisions seems to be that if it appears that the insurance was effected as part of the contract for the loan, or if it is to be inferred from the circumstances that the insurance was in fact effected for the purpose of securing the loan, the policy will be redeemable upon payment to the mortgagee of what is due to him for principal, interest, premiums and costs, though the mortgage contains no proviso to that effect or even contains a proviso to the contrary (*v*). If, however, there is no evidence of a contract to effect the insurance by way of security, and it appears that the mortgagee effected the insurance at his own expense and for his own protection, he will be entitled to the insurance money absolutely for his own benefit (*w*).

(*t*) *Wiltse v. Excelsior Life Insurance Co.*, 1916, 10 A.L.R. 67, 29 D.L.R. 32.

(*u*) This paragraph is quoted in substance from the notes in 18 R.C. at p. 366, to the case of *Jennings v. Ward* (as to which see §25, *supra*).

(*v*) *Holland v. Smith*, 1806, 6 Esp. 11; *Drysdale v. Piggott*, 1856, 8 D.C. M. & G. 516; *Morland v. Isaac*, 1855, 20 Beav. 389; *Bruce v. Garden*, 1869, L.R. 5 Ch. 32; *Salt v. Marquess of Northampton*, [1892] A.C. 1.

(*w*) *Freemantle v. Brade*, 1858, 2 D.C. & J. 5; *Brown v. Freeman*, 1851, 4 D.C. & S. 444; *Bashford v. Cann*, 1865, 10 Beav. 109; *Bruce v. Garden*, *supra*; *Preston v. Neele*, 1879, 12 Ch.D. 760.

§27. *Disguised forms of mortgage.*

A conveyance of property, in consideration of an advance, upon trust to sell in the discretion of the grantee with a declaration of the trusts of the proceeds of sale and a power on the grantee's part to enter and apply the rents in keeping down the interest is in substance a mortgage whether it is made to the lender himself or to a third party as trustee (*x*).

Equity regards the substance rather than the form of the transaction. If a conveyance absolute in form is intended to be a mortgage, the vendor will have the usual equitable right of a mortgagor to redeem (*y*), but in the absence of evidence that the transaction is a disguised mortgage or of fraud, undue influence or other ground of invalidity, the vendor will receive no assistance from equity. The evidence that the transaction is really a mortgage must be clear and conclusive (*z*), especially if it is contradicted by the recitals in the document (*a*).

Similar principles apply to the case of a conveyance with an option to repurchase. In the absence of fraud or unless the transaction is a disguised mortgage (*b*), time is of the essence of the contract and equity will give no relief if the option is not exercised within the period contracted for (*c*).

(*x*) In re Alison, Johnson v. Mounsey, 1879, 11 Ch.D. 284, at p. 294.

(*y*) Williams v. Owen, 1810, 5 My. & Cr. 303, at p. 306; Beaton v. Wilbur, 1906, 3 N.B. Eq. 309; Winthron v. Roberts, 1907, 17 M.R. 20; Whitlow v. Stimson, 1909, 14 B.C.R. 321.

(*z*) McMicken v. Ontario Bank, 1891, 20 Can S.C.R. 548; Holmes v. Matthews, 1855, 9 Moo. P.C. 412, 5 Gr. 108.

(*a*) Barton v. Bank of New South Wales, 1880, 15 App. Cas. 379; Boarman v. Handley, 1899, 4 N.W.T.L.R. 266.

(*b*) Fink v. Patterson, 1860, 8 Gr. 417; Hawke v. Milliken, 1866, 12 Gr. 236.

(*c*) Joy v. Birch, 1826, 4 Cl. & F. 58, at p. 89; Roscoe v. McConnell, 1913, 29 D.L.R. 121, 25 O.W.R. 149; cf. Dibbins v. Dibbins, [1896] 2 Ch. 348. But the right to strict performance may be waived. Pegg v. Wisden, 1852, 16 Beav. 239.

Extrinsic evidence may be given of circumstances which tend to shew that a conveyance absolute in form or a conveyance with an option to repurchase is really a mortgage, as, for instance, that the consideration was grossly inadequate as the purchase price of the property, that the purchaser was not let into immediate possession of the property, that the purchaser kept accounts of the receipts and disbursements or otherwise continued to treat the vendor as his debtor, or that the vendor remained liable to repay the money or paid in interest (*d*).

Evidence may also be given of the declared intention of the parties. It was held in some cases in Upper Canada and Ontario that oral evidence of the intention of the parties that the transaction was a mortgage was not admissible unless a foundation had first been laid by evidence of circumstances such as those mentioned above (*c*). This qualification of the right to give evidence to show that the document is other than it appears to be does not seem to be maintained in the English cases, and evidence is admitted on the ground that to exclude it would enable the Statute of Frauds to be used as a cloak for fraud (*f*).

(*d*) *Thornbrough v. Baker*, 1677, 3 Swanst. 628, at p. 631, 18 R.C. 231, at p. 233; cf. 2 W. & T.L.C. Eq., at pp. 31-35. The test is the mutuality and reciprocity of the remedies of the parties. If the transaction is a mortgage for one party it must be a mortgage for the other. *Goodman v. Grierson*, 1813, 2 Ball & B. 274, 18 R.C. 6; *Allenby v. Dalton*, 1825, 5 L.J.K.B. 312; *Bell v. Carter*, 1853, 17 Beav. 11; *Alderson v. White*, 1858, 2 DeG. & J. 97; *Bullen v. Renwick*, 1862, 9 Gr. 202; *Hawke v. Milliken*, 1866, 12 Gr. 236; *Healey v. Daniels*, 1868, 14 Gr. 633; *Rapson v. Horsee*, 1869, 16 Gr. 685; *Robinson v. Chisholm*, 1894, 27 N.S.R. 74; *Cleary v. Aitken*, 1914, 19 B.C.R. 369, 17 D.L.R. 548.

(*c*) See review of earlier cases in *Ross v. Scott*, 1875, 21 Gr. 391, affirmed 22 Gr. 29; cf. dissenting judgment of Strong J. in *Barton v. McMillan*, 1892, 20 Can S.C.R. 404, at p. 412.

(*f*) In *re Duke of Marlborough*, *Davis v. Whitehead*, [1894] 2 Ch. 123; *Rockefort v. Roushead*, [1897] 1 Ch. 196, at pp. 206, 207. See also a learned and elaborate article by C. B. Labatt in 29

If a mortgage is expressed in the form of an absolute conveyance, the mortgagor's right to redeem cannot be asserted as against a purchaser in good faith without notice from the mortgagee (*g*). The mortgagee has no power of sale, unless indeed a statutory power of sale can be imported into the deed; nor can the mortgagee foreclose; he holds the land as trustee, and his only remedy, in the absence of the concurrence of the mortgagor, is to have a sale through the court (*h*).

The doctrine that a transfer absolute in form may be shown to be in reality a mortgage applies to a transfer and a certificate of title under the land titles system (*i*), but it has been held in Manitoba that where land is transferred and a certificate of title is issued and it is proved that the transaction is intended to be by way of security merely, the effect is the same as if the transferee had, not a statutory charge or mortgage under the new system of land titles, but a bare mortgage under the old system of registration without redemise clause, covenants or provisos (*j*).

§28. *Nature of an equity of redemption.*

The classical dictum as to the nature of an equity of redemption is that of Lord Hardwicke in *Cashorne v. Searle* (*k*) as follows:

D.L.R. 125 ff. in which the cases are collected and the Ontario doctrine is criticised, and it is pointed out that in the other provinces in which the common law prevails the admissibility of oral evidence has been asserted without qualification.

(*g*) *Barnhart v. Greenshields*, 1853, 9 Moo. P.C. 18, 5 Gr. 99

(*h*) *Hetherington v. Sinclair*, 1915, 34 O.L.R. 61. Cf. *Oland v. McNeil*, 1902, 32 Can. S.C.R. 23, affirming 34 N.S.R. 453, in which it was held that the transferee had a right to sell without notice to the transferor, the transfer having been made on the understanding that the transferee should sell the property, pay out of the proceeds certain sums owing to the transferee and another, and account to the transferor for the balance.

(*i*) See *Blunt v. Marsh*, 1888, 1 N.W.T.L.R. 126; *Short v. Graham*, 1908, 7 W.L.R. 787; *McCue v. Smith*, 1911, 17 W.L.R. 145. As to the Land Titles Acts generally, see chapter 10.

(*j*) *Rutherford v. Mitchell*, 1904, 15 M.R. 390.

(*k*) 1737, 1 Atk. 603, at p. 605, 2 W. & T. L. C. Eq. 6, at p. 9.

An equity of redemption has always been considered as an estate in the land, for it may be devised, granted, or entailed with remainders, and such entail and remainders may be barred by a fine and recovery, and therefore cannot be considered as a mere right only, but such an estate whereof there may be seisin: the person, therefore, entitled to the equity of redemption is considered as the owner of the land, and a mortgagee in fee is considered as personal owner.

The books contain many other *obiter dicta* to the same effect. All that can be accurately said, however, is that an equity of redemption is considered for many purposes as if it were an estate in the land. If it were truly an estate, it would be so for all purposes, whereas it is clear that for some purposes it is not regarded as an estate (*l*).

As was well said by Sir James Bacon, V.C., in *Paget v. Ede* (*m*).

"The deed is executed, the legal estate passes to the mortgagee. Then what remains? The equity of redemption. It is said that that is an estate. But it is by a figure of speech only that it

18 R.C. 369, at p. 373. The decision was merely that the mortgagor had at the time of her death such an interest in the land that her husband was entitled to a tenancy by the curtesy. See chapter 18, *Dower and Curtesy in Mortgaged Land*, §176.

(*l*) A mortgagor, after execution of the mortgage, is not seised of the land according to the common law and therefore is not liable to the burdens of tenure incident to customary freeholds, such as a heriot due to the lord of a manor on the death of a tenant seised of a tenement in the manor. It would be wholly unreasonable to apply to the custom (by which the lord was entitled to the "best beast" of the tenant) the comparatively modern doctrine as to the equity of redemption being an estate in the land. *Copstake v. Hoper*, [1908] 2 Ch. 10. See discussion of this case in Challis, *Real Property*, 2nd ed., pp. 416-418.

(*m*) 1874, L.R. 18 Eq. 118, at p. 125. In this case it was held that there was jurisdiction to decree foreclosure as to land in the West Indies, because the decree merely operated *in personam* by depriving the mortgagor of a personal right. See chapter 24, *Action for Foreclosure or Sale*, §231.

can be called an estate. It may be in some instances that a husband may have a title by courtesy, and that gavelkind and borough English may apply to it. All these are necessary consequences of the law which recognises the interest of a mortgagor in his equity of redemption, but they do not alter the nature of the interest or create an estate; and in my opinion it is a mis-application of terms to call an equity of redemption an estate in the proper technical legal sense. That it is a right is beyond all doubt—a right which may be enforced in this Court, and which is recognized by the record in this case."

The equity of redemption is not merely not an estate in any strict sense, it is not even an absolute right. Like all equitable rights it is subject to the equitable rules of the court which invented it. It may be refused on the ground that it would be inequitable to grant it, as, for instance, when the mortgagor has been guilty of laches (*n*), or it may be granted on condition that the mortgagor does equity (*o*).

§29. *How the equity of redemption may be barred or extinguished.*

Although a mortgagor cannot, at the time of the making of the mortgage and as part of the mortgage transaction, contract himself out of his equity of redemption (*p*), he may agree that the mortgage shall be irredeemable for a reasonable period (*q*). The equity of redemption may also be barred by lapse of time (*r*), or extinguished by foreclosure or by sale under order of the court (*s*) or by sale under the power of sale (*t*).

Furthermore a mortgagor may, by a separate and independent transaction subsequent to the making of the mortgage

(*n*) See chapter 25, *Action for Redemption*, §251.

(*o*) The doctrine of consolidation is an illustration. See chapter 9, *Consolidation and Tacking*, §81.

(*p*) See §23, *supra*.

(*q*) See chapter 25, *Action for Redemption*.

(*r*) See chapter 26, *Limitation of Actions*.

(*s*) See chapter 24, *Action for Foreclosure or Sale*.

(*t*) See chapter 31, *Sale under Power of Sale*.

oil or release his equity of redemption to the mortgagee, or give the mortgagee the option of purchasing the mortgaged property and thus in effect deprive himself of his right to redeem (*u*). *Prima facie*, if a mortgagee takes a release of the equity of redemption, the mortgage debt is deemed to be satisfied (*v*). The release by the mortgagee of the debt is sufficient consideration for the release by the mortgagor of the equity of redemption. The relation of the parties is that of vendor and purchaser and the onus of justifying the transaction is not upon the mortgagee (*w*).

(*u*) The general proposition was stated in a case in which the House of Lords affirmed the finding of fact of the Court of Appeal that the agreement for the option was really a separate transaction from the mortgage transaction. The members of the Court of Appeal were careful to dissociate themselves from the opinion expressed by Buckley, J., that the transactions were not separate and that the agreement for the option was nevertheless valid as a conditional sale. *Reeve v. Lisle*, [1902] A.C. 401, affirming *Lisle v. Reeve*, [1902] 1 Ch. 53.

(*v*) *British and Canadian Loan and Investment Co. v. Williams*, 1888, 15 O.R. 366; *North of Scotland Mortgage Co. v. Udell*, 1882, 46 U.C.R. 511.

(*w*) *Knight v. Marjoribanks*, 1849, 2 Mac. & G. 10; *Melbourne Banking Corporation v. Brougham*, 1882, 7 App. Cas. 307. The transaction may, however, be impeached in special circumstances, as, e.g., on the ground of inequality, pressure or undervalue. *Ford v. Olden*, 1867, L.R. 3 Eq. 461.

CHAPTER IV.

LAW AND EQUITY IN UPPER CANADA.

- §31. Common law in Upper Canada, p. 57.
- §32. The law of mortgage, p. 58.
- §33. Introduction of equitable jurisdiction, p. 61.
- §34. Subsequent changes in the courts, p. 64.
- §35. The Judicature Act, p. 66.

§31. *Common law in Upper Canada (a).*

The statute of Upper Canada which in 1792 introduced the "laws of England" as the rule for the decision of all matters of controversy relative to property and civil rights, also provided that all matters relative to testimony and legal proof in the investigation of fact and the forms thereof *in the several courts of law and equity* within the province should be regulated by the rules of evidence established in England (b).

(a) In substance §§31, 32 and 33 are parts of an article under the title "Law and Equity in Upper Canada" by the present writer published in 64 *University of Pennsylvania Law Review*, pp. 1-21 (Nov., 1914) and 34 *Canadian Law Times*, pp. 1130-1146 (Dec., 1914). In that article a more extended account is given of the establishment in 1837 of a court of equity, and of the inconveniences resulting from the lack of equitable jurisdiction.

(b) 32 G. 3, c. 1; R.S.O. 1914, c. 101. The effect, generally speaking, was to supersede the French Canadian law which had theretofore been the rule for the decision of matters of controversy relative to property and civil rights and to adopt the English common law as of the 15th of October, 1792. It was held that the terms of the statute did not "place the introduction of the English law on a footing materially different from the footing on which the laws of England stand in those colonies in which they are merely assumed to be in force, on the principles of the common law, by reason of such colonies having been first inhabited and planted by British subjects." *Doe dem. Anderson v. Todd*, 1845, 2 U.C.R. 82, at p. 86. In other words, such portions of the common law as were not reasonably applicable

When this statute was passed there existed in the province local courts of common pleas surviving from the period prior to the division of Quebec into the two Canadas. The legislature also created in the same year local courts of requests for the trial of small causes (c). Neither the courts of common pleas nor the courts of requests were bound by the strict rules of the common law. In 1794, however, the courts of common pleas were superseded by the Court of King's Bench for Upper Canada (d), from which an appeal lay to the governor and council of the province. From that date until 1837 there was no superior court with any equitable jurisdiction.

§32. *The law of mortgage.*

The law of mortgage afforded the most conspicuous illustration of the inconvenient result of the lack of equitable jurisdiction. The relation of mortgagor and mortgagee was governed by the common law as modified by statute. By the common law if the mortgagor did not perform the condition of the mortgage the estate of the mortgagee became absolute. If the mortgagor gave up possession the mortgagee obtained at least a good possessory title which there was no law

to the conditions of the province were not introduced in 1792. *Keewatin Power Co. v. Kenora*, 1906, 13 O.L.R. 237, at p. 259, and cases there cited. *Hixon v. Reaveley*, 1904, 9 O.L.R. 6. See, however, *Keewatin Power Co. v. Kenora*, 1908, 16 O.L.R. 184, at pp. 189, 196, 200, where a stricter construction of the statute is suggested.

(c) 32 G. 3, c. 6. The justices of the peace who were authorized to hold courts of requests were directed to decide "as to them shall seem just in Law and Equity." The judge of a division court in Ontario to-day may "make such order or judgment as appears to him just and agreeable to equity and good conscience."

(d) 34 G. 3, c. 2. The statute conferred upon the court jurisdiction equivalent to that then possessed by the Court of King's Bench, the Court of Common Bench, or in matters which regarded the king's revenue, by the Court of Exchequer in England, but there was no mention of any equitable jurisdiction. Cf. *Simpson v. Smyth*, 1846, 1 U.C.E. & A. 1, at pp. 57, 66.

to disturb (c). The mortgagor could not file a bill to redeem and the mortgagee was free to deal with the land as his own. If the mortgagor refused to give up possession the mortgagee was driven to an action of ejectment, a power of sale not being usually provided for. In such an action the British statute 7 G. 2, c. 20 had provided that the mortgagor might pay or bring into court the principal, interest and costs, and become entitled to a reconveyance of the mortgaged estate. So long as the mortgagor remained in possession this statute afforded to him to some extent the same protection as a court of equity could have given him. The bringing of the action operated as effectual notice that the mortgagee insisted upon either his money or his estate. If the mortgagor did not take advantage of the statute and pay the money, the mortgagee would get possession and practically the same status at law as if he had foreclosed in equity, the possible difference being that he got a speedier remedy than he would have got in equity. The statute could, however, be taken advantage of only if there were no accounts to be investigated and no disputed payment, and might therefore not cover some cases of hardship. If the mortgage debt was not paid on the day, the mortgagee could bring an action of ejectment and then the mortgagor could get back his estate only if he admitted the sum to be due which the mortgage was given to secure, and paid or brought into court that sum (f).

On the other hand the inability to get any judicial declaration of title on the mortgagor's default was doubtless a source

(e) *Smyth v. Simpson*, 1859, 7 Moo. P.C. 205, 5 Gr. 104

(f) *Doe dem. McKenzie v. Rutherford*, 1844, 1 U.C.R. 172. A hard case, because it appeared that the mortgage debt had probably been paid, but the accounts were disputed. The statute in question is re-enacted in British Columbia as the "Mortgagors' Relief Act," R. S. B.C. 1911, c. 168. It is no longer in force in Ontario, being superseded by the existing rules of practice relating to mortgage actions. See chapter 24, *Action for Foreclosure or Sale*.

of perplexity to the mortgagee. He had no means of guarding against the equity of redemption which slumbered in the minds of solicitors familiar with English books or to which effect might possibly be given under an equitable jurisdiction to be created in the future. It seems to have been not unusual for the mortgagee, after the mortgagor's default, to obtain judgment on the covenant and cause the mortgagor's interest in the land to be sold under a writ of *fi cri facias* (g).

This ill advised attempt to sell under legal process an interest which in the absence of equitable jurisdiction had no real existence, and which in any case was not recognized at common law and therefore could not be affected by legal process, was at an early date held to be inoperative, but so late as 1846 it formed the subject of an elaborate argument (h), and the attempt was doubtless due to the desire of the perplexed mortgagee to give to his title the sanction of some judicial proceeding. The sale under writ of *fi cri facias*, how-

(g) The right of a creditor in Upper Canada, instead of issuing a writ of *elegit*, to issue a writ of *fi cri facias* against the lands of his debtor was based upon the British statute 5 G. 2, c. 7, entitled "an act for the more easy recovery of debts in his majesty's plantations and colonies in America," by which the property of a debtor became liable to be seized, extended, sold or disposed of in the same manner as personal estate. The result was that lands became assets in the hands of an executor for the satisfaction of debts, so that to a plea of *plene administravit* the plaintiff might reply *lands*. See *Gardiner v. Gardiner*, 1832, 2 U.C.O.S. 554; in the judgment the earlier cases are reviewed, and at p. 581 the practice in the province in the case of an execution, either against the original debtor or against his personal representative, is explained. It was in early days irregular to issue a *peri facias* against lands until after the return of the execution against goods, (*Doe dem. Spafford v. Brown*, 1833, 3 U.C.O.S. 92), but this rule was changed by the statute 31 V. c. 25. It was doubtful whether the right to the remedy by *elegit* was not taken away, and the *fi cri facias* did not bind the land until the delivery of the writ to the sheriff. *Doe dem. McIntosh v. McDonnell*, 1855, 4 U.C.O.S. 195. The land could not be sold within less than twelve months after the delivery of the writ to the sheriff.

(h) *Simpson v. Smyth*, 1 U.C.E. & A., at pp. 41 ff.

ever inoperative as a legal transfer of a supposed equity of redemption, might plausibly be urged as a circumstance in the mortgagee's favour in the event of the mortgagor's afterwards endeavouring to redeem if a court should be established with equitable jurisdiction, or might be regarded as a sale by the mortgagee for the benefit of the mortgagor with a view to realizing the encumbrance and returning the excess to the mortgagor (i).

§33. *The introduction of equitable jurisdiction.*

In the year 1834 the first allusion was made in the statutes of Upper Canada to a mortgagor's equity of redemption. The statute 4 W. 4, c. 16 contained a provision for giving to a certificate of payment of the mortgage money, when registered, all the effect of a release of the mortgage and of a reconveyance of the estate, and it was thought prudent to add a proviso that such certificate, if given after the expiration of the period within which the mortgagor had a right in equity to redeem, should not have the effect of defeating any title other than a title remaining vested in the mortgagee or his heirs, executors and administrators. By this the legislature seems to have apprehended that otherwise a mortgagee, after acquiring an estate which ought to be held absolute in equity as well as at law, and after transferring such estate to some other party, might, by receiving the mortgage money and giving a certificate, defeat the estate of the purchaser (j). In the same year the legislature passed the sta-

(i) *Ibid.* at p. 192. After the establishment of a court of equity the law was amended by 12 V. c. 73, so as to render an equity of redemption saleable under execution. Before the amendment if the mortgage was merely for a term of years—even one thousand years—the reversion might be sold and would carry with it the equity of redemption. *Wightman v. Fields*, 1872, 19 Grant 555 565. For the present law, see chapter 16, *Execution Creditors of the Mortgagor*.

(j) *Robinson, C.J. in Simpson v. Smyth*, 1846, 1 U.C.E. & A. 57 ff.; cf. pp. 61, 90-91, 181. As to the present statute law with regard

tute 4 W. 4, c. 1, adopting with some modifications many of the improvements in the law of real property which had lately been made in England upon the recommendation of commissioners. In this act mention is made in several clauses of equitable interests and estates as distinguished from legal estates, and there are provisions in respect of each, corresponding with those contained in the English legislation. The limitation of twenty years is adopted with regard to any *suits in equity* as well as to actions at law, with a proviso (s. 35) such as the English statute contains, "that nothing in this Act contained shall be deemed to interfere with any rule or jurisdiction of Courts of Equity, in refusing relief on the ground of acquiescence or otherwise, to any person whose right to bring a suit may not be barred by virtue of this Act." The section of the English statute respecting the limitation of time for the assertion of a mortgagor's rights is very closely followed, and at the end of s. 43, in which provision is made for limiting the time for suing at law or in equity for any mortgage money or for any legacy, there is a proviso, "that in respect to persons *now entitled to an equity of redemption*, or to any legacy, the right to bring an action or to pursue a remedy for the same, shall not be deemed to be extinguished or barred by lapse of time, *until the expiration of five years from the time that an equitable jurisdiction shall be established in this province, and in the exercise of its powers*; provided that shall happen within ten years from the passing of this Act." (k).

In 1837 the legislature passed a statute authorizing the appointment of two additional judges for the Court of King's Bench (l). In the same year was passed the statute commonly

known as a discharge of mortgage, see chapter 19, *Discharge or Reconveyance*.

(k) The italics are not in the original statute.

(l) 7 W. 4, c. 1. The court had theretofore consisted of the Chief Justice of Upper Canada and two *puisne* judges

known as the Chancery Act (*m*), which for the first time afforded the means of enforcing equitable rights in Upper Canada for any purpose or to any extent.

By the Chancery Act, passed on the 4th of March, 1837, there was established a court of equity to be known as "The Court of Chancery for the Province of Upper Canada," of which the governor should be chancellor, and for the better administration of justice in the said court it was enacted that the judicial powers thereof, both legal and equitable, should be exercised by a judge to be known as "the Vice Chancellor of Upper Canada."

It was provided that the said court "shall have jurisdiction and possess the like power and authority as by the laws of England are possessed by the Court of Chancery in England, in respect of the matters hereinafter enumerated," that is to say, in all cases of fraud; in all matters relating to trusts, executors and administrators, and mortgages; in all matters relating to infants, idiots and lunatics, and their estates, except where special provision had been made or might thereafter be made with respect to them by any law of the province; in all matters relating to awards; to compel the specific performance of agreements; to compel the discovery of concealed papers or evidence, or such as might be wrongfully withheld from the party claiming the benefit of the same; to prevent multiplicity of suits and to stay proceedings in a court of law prosecuted against equity and good conscience; to decree the issue of letters patent from the Crown to rightful claimants; to institute proceedings for the repeal of letters patent erroneously or improvidently issued; to stay waste; in all cases of accident; in all cases of account; and in all cases relating to co-partnership (*n*).

(*m*) 7 W. 4, c. 2, an Act to establish a Court of Chancery in this Province.

(*n*) See R.S.O. 1897, c. 51, s. 26, in force as of the date of the original act, the 4th of March, 1837.

It was further provided that the rules of decision should be the same as governed the Court of Chancery in England, and that the court should possess full power and authority to enforce and compel obedience to its orders, judgments and decrees to the same extent as was possessed by the Court of Chancery in England, in respect of all matters within its jurisdiction, except when otherwise provided by the laws of the province (*o*).

§34. *Subsequent changes in the courts.*

The history of the courts of Upper Canada has been referred to in the foregoing pages sufficiently to illustrate the jurisdiction with regard to mortgages at law and in equity respectively. The subsequent changes in the constitution of the courts may be briefly mentioned.

By statutes of the province of Canada passed in 1849, the superior courts of law and equity in Upper Canada were reorganized. In place of the provision of the statute of 1837 under which the judicial powers of the Court of Chancery were exercised by a single vice-chancellor it was enacted that a court should be presided over by a chief judge to be called the Chancellor of Upper Canada, and that there should be two additional judges to be called vice-chancellors (*p*). A new court to be called the Court of Common Pleas was also established, consisting of a chief justice and two puisne justices (*q*). Upon this court was conferred a jurisdiction identical with that possessed by the existing court of Queen's Bench, and it was provided that in the first instance two puisne judges should be transferred to the new court from the Court of Queen's Bench, which was thus reduced to a chief justice and two puisne judges, as originally constituted.

(*o*) Cf. R.S.O. 1897, c. 51, s. 27.

(*p*) 12 V. c. 64, ss. 1 and 2.

(*q*) 12 V. c. 63.

The total number of judges having been increased by the statutes above mentioned from six to nine, advantage was taken of the opportunity to establish a new "Court of Error and Appeal" which it was considered would afford a more satisfactory appellate tribunal than the old court of the governor and council. All the judges of the three superior courts of law and equity were constituted members of the new appellate court, which was to be presided over by the Chief Justice of the Court of Queen's Bench, or in his absence by the judge who should be next entitled to precedence, and appeals were authorized to be brought from any of the three superior courts, with a right of further appeal in certain cases to the Queen in council (*r*).

On the 10th of June, 1857, an act (*s*) was passed "for further increasing the efficiency and simplifying the proceedings of the Court of Chancery." By the first section it was enacted that the court should thereafter "possess the like power, authority and jurisdiction as the Court of Chancery in England possesses, as a court of equity, to administer justice in all cases in which there may be no adequate remedy at law; provided always that nothing herein shall be held to impair or diminish the jurisdiction heretofore conferred by law on the said court." On the 18th of March, 1865, it was enacted (*t*) that: "the Court of Chancery in Upper Canada shall have the same equitable jurisdiction in matters of revenue as the Court of Exchequer in England possesses."

The Court of Chancery in Upper Canada had thus acquired a complete equitable jurisdiction, and all the superior courts of original jurisdiction had assumed the form under which they continued until the passing of the Ontario Judicature Act of 1881. Long before the last mentioned date,

(*r*) 12 V. c. 63, ss. 37 to 40, 46.

(*s*) 20 V. c. 56.

(*t*) 28 V. c. 17.

however, some equitable powers had been conferred on the courts of common law and some powers formerly peculiar to courts of common law had been conferred on the court of equity, and in 1873 by the Administration of Justice Act (*u*) a long step was taken towards rendering the jurisdiction of the courts of law and that of the court of equity concurrent. In 1874 provision was made for the constitution of an appellate court of four judges entirely distinct from the courts of original jurisdiction (*v*), and its name was changed from the Court of Error and Appeal to the Court of Appeal (*w*).

§35. *The Judicature Act*

Radical changes in the constitution and jurisdiction of the courts were made by the Ontario Judicature Act, 1881 (*x*), which was drawn on the model of the English Supreme Court of Judicature Act 1873 (*y*). The Court of Appeal for Ontario, the Court of Queen's Bench, the Court of Chancery and the Court of Common Pleas were united and consolidated in one Supreme Court of Judicature for Ontario, consisting of two permanent divisions, namely, the Court of Appeal for Ontario and the High Court of Justice. The last mentioned court was subdivided into three divisions under the names of the Queen's Bench Division, the Chancery Division and the Common Pleas Division, representing the two courts of common law and the court of equity then existing (*z*), and it was

(*u*) 36 V. c. 8, An Act for the better administration of Justice in the Courts of Ontario.

(*v*) 37 V. c. 7, An Act to make further provision for the due Administration of Justice.

(*w*) 39 V. c. 7, s. 22. In 1883, by the statute 46 V. c. 6, provision was made for the appointment of an additional justice of appeal.

(*x*) 44 V. c. 5, in effect as of the 22nd of August, 1881.

(*y*) The English statute, together with an amending statute of 1875, came into effect on the 1st of November, 1875.

(*z*) By the statute 3 E. 7, c. 8, a fourth division of the High Court of Justice was created in 1903 under the name of the Exchequer

enacted that the High Court of Justice should be deemed to be a continuation of the said courts and should have all the jurisdiction vested in such courts prior to the passing of the statute (*a*).

It is to be noted, however, that though in the statute language is used which would indicate that the old courts continued in existence under new names, the divisions of the High Court of Justice were different from the old independent courts (*b*). Under the English statute certain kinds of business were assigned to particular divisions. Thus to the Chancery Division were assigned "the redemption or foreclosure of mortgages" and other matters which before the statute were within the exclusive jurisdiction of the Court of Chancery. But this is to be regarded as a mere matter of convenience. The distribution of business might at any time be changed without an act of parliament by rules made by the judges (*c*), and if an action were brought in the wrong division a judge of that division would have jurisdiction to try it instead of ordering it to be transferred to another division. Under the Ontario statute no distinction was made as to the kind of

Division. Provision had already been made by the statute 54 V. c. 13, s. 1, for the decrease in the membership of the Chancery Division from four to three judges.

(*a*) The latest consolidation of the various statutes by which prior to the Judicature Act jurisdiction was conferred on the different superior courts of law and equity is contained in R.S.O. 1897, c. 51 ss. 25 ff. As to the jurisdiction of the Court of Appeal, see ss. 49 ff.

(*b*) As to the following observations on the English statute, see Maitland, *Equity and the Forms of Action*, pp. 15, 16.

(*c*) Under the English statute even the divisions might be changed without act of parliament. The old courts of common law and equity had given place in 1875 to the Chancery Division, the Queen's Bench Division, the Common Pleas Division, the Exchequer Division, and the Probate, Divorce and Admiralty Division. In 1880 pursuant to a recommendation of the judges an order in council was passed uniting and consolidating the three common law divisions under the name of the Queen's Bench Division.

business which should be assigned to a particular division, and the individual judges of all divisions took their turn in doing every kind of judicial work (*d*). The only significance of the divisions was that the judges of one division usually sat together to constitute a divisional court.

Furthermore, every judge, to whatever division he belonged, was bound in any case that might come before him to administer both law and equity. The change effected by the Judicature Act (*e*) in this respect has been well summed up in the following words (*f*):

The plaintiff may assert any equitable claim in any court; and may obtain an equitable relief in any court. The defendant may raise any equitable answer or defence to any claim in any court, that is to say, anything which would formerly have been good by way of answer if the suit had been brought in Chancery, or would have afforded ground for an injunction if the action had been brought at law; he may assert, by way of counter-claim against the plaintiff, any claim, legal or equitable, which he might have raised by a cross-suit at law or in equity; the defendant may also obtain relief relating to, or connected with, the original subject of the action, against other persons, whether already parties or not. Every court is to recognize equitable rights incidentally appearing. No cause is to be restrained by injunction, but what would have been ground for injunction is to be raised by way of defence, or upon an application to stay proceedings. Subject to these provisions, common law rights and duties are to be recognized. Every court is to apply all appropriate remedies, and dispose of all matters in controversy.

With regard to substantive law the Judicature Act contained a long section passed to "amend and declare" the law in various respects. The section ended with these words:

(*d*) The result is that in Ontario a judge must be a judicial jack of all trades. The principle is carried farther towards its logical conclusion in the Law Reform Act, 1909, hereinafter referred to.

(*e*) Ontario Judicatures Act, 1881, s. 16; cf. R.S.O. 1914, c. 56, s. 19.

(*f*) Quoted, with some verbal modifications, from Wilson, *Judicature Acts*, 7th ed., p. 15.

(*g*) Ontario Judicature Act, 1881, s. 17.

(10) Generally in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the Rules of Equity and the Rules of the Common Law with reference to the same matter, the Rules of Equity shall prevail (*h*)

The language of the statute just quoted expresses the view, which was probably the prevailing one down to a comparatively modern period (*i*) that the rules of law and the rules of equity were in "conflict" (*j*). The opposite view, namely, that the relation between law and equity at the time of the passing of the Judicature Act was not one of conflict has been maintained by Maitland, Langdell, Ames and others (*k*).

By the Law Reform Act, 1909 (*l*), which came into effect on the first of January, 1913, the Supreme Court of Judicature for Ontario was designated the Supreme Court of Ontario, and the High Court of Justice for Ontario and the Court of Appeal for Ontario were designated respectively the

(*h*) The provision is now contained in R.S.O. 1914, c. 56, s. 22, but many of the other provisions contained in s. 17 of the original act have been distributed among other statutes according to their subject matter.

(*i*) See W. W. Cook in 27 Yale L.J. 290 (December, 1917), referring to some of the literature on both sides of the question.

(*j*) Spence, *Equitable Jurisdiction of the Court of Chancery* (note to book II, chapter I); Pomeroy, *Equity Jurisdiction*, 2nd ed., secs. 48-54, 127; W. N. Hohfeld, articles in 11 Mich. L.R. 537 (June, 1913), 26 Yale L.J. 767 (June, 1917); W. W. Billson, *Equity in its Relations to Common Law*, Boston, 1917; W. W. Cook, *supra*.

(*k*) Maitland, *Equity and the Forms of Action*, pp. 16 ff., 156 ff.; Ames, article in 1 Harv. L.R. 1 at p. 9 (April, 1887); Langdell, *Brief Survey of Equitable Jurisdiction*, 2nd ed., pp. 4 ff., 251 ff., *Summary of Equity Pleading*, 2nd ed., 210, 211, and articles in 1 Harv. L.R. 55 at p. 58 (May, 1887), 13 Harv. L.R. 659, at pp. 673, 677 (April, 1900); John Adams, *Treatise on Equity*, 8th ed., xxiv and xxix; cf. 13 Halsbury, *Laws of England*, 61.

(*l*) 9 E. 7, c. 28. In 910, by the statute 10 E. 7, c. 28, provision was made for the appointment of two additional judges of the High Court not to be attached to any division. The result, under the Law Reform Act, is that there are nine judges of the High Court Division in addition to the five judges chosen each year for the second divisional court of the Appellate Division.

High Court Division and the Appellate Division of the Supreme Court of Ontario. The divisions and divisional courts of the High Court were abolished, and the appellate jurisdiction vested in the said courts was transferred to the Appellate Division. It was further provided that there should be at least two divisional courts of the Appellate Division, the first to consist of the Chief Justice of Ontario and four justices of appeal, the second to consist of five members of the High Court Division selected year by year by the judges of the Supreme Court.

It is now provided by the Judicature Act, R.S.O. 1914, c. 56, ss. 3, 12 and 13, as follows:

3. The Supreme Court shall be continued as a superior court of record, having civil and criminal jurisdiction, and it shall have all the jurisdiction, power and authority which on the 31st day of December, 1912, was vested in or might be exercised by the Court of Appeal or by the High Court of Justice or by a Divisional Court of that Court, and such jurisdiction, power and authority shall be exercised in the name of the Supreme Court.

12.—(1) The Appellate Division shall exercise that part of the jurisdiction vested in the Supreme Court which, on the 31st day of December, 1912, was vested in the Court of Appeal and in the Divisional Courts of the High Court, and such jurisdiction shall be exercised by a Divisional Court of the Appellate Division, and in the name of the Supreme Court.

(2) Except as provided by the next preceding subsection, all the jurisdiction vested in the Supreme Court shall be exercised by the High Court Division in the name of the Supreme Court.

13.—(1) All jurisdiction, power and authority which on the 31st day of December, 1912, was vested in or exercisable by the Chief Justice of Ontario or by a Justice of Appeal, shall be vested in and may be exercised by a Judge of the Appellate Division, and shall be exercised in the name of the Supreme Court.

(2) All jurisdiction, power and authority which on the 31st day of December, 1912, was vested in or exercisable by a Judge of the High Court shall be vested in and may be exercised by a Judge of the High Court Division, and shall be exercised in the name of the Supreme Court.

CHAPTER V.

EQUITABLE MORTGAGES.

- §41. Definition of equitable mortgage, p. 71.
- §42. How an equitable mortgage is created, p. 72.
- §43. Mortgage of equitable interest, p. 73.
 - (1) Mortgage of an equity of redemption.
 - (2) Mortgage of other equitable interest.
- §44. Mortgage by instrument not sufficient to convey the legal estate, p. 75.
 - (1) Defect of form.
 - (2) Agreement to give a mortgage.
 - (3) Charge on land.
- §45. Mortgage by deposit of title deeds, p. 77.
- §46. Remedies of equitable mortgage, p. 80.
- §47. Floating charge, p. 82.

§41. *Definition of equitable mortgage.*

It has already been pointed out that it is an essential feature of a legal mortgage that it should vest the legal estate in land in the mortgagee (*a*), and it follows that any mortgage which does not transfer the legal estate cannot be a legal mortgage. Equity not only annexed to a legal mortgage contains inevitable terms which it enforced without regard to the contract of the parties (*b*), but it recognized as valid charges mortgages other than legal mortgages and annexed to them the same inevitable terms.

An equitable mortgage therefore is a contract which creates in equity a charge on property but does not pass the legal

(a) See chapter 2, *Mortgage at Common Law*, §11.

(b) See chapter 3, *Legal Mortgage in Equity*, §22.

estate to the mortgagee (c). Its operation is that of an executory assurance, which, as between the parties, and so far as equitable rights and remedies are concerned, is equivalent to an actual assurance, and is enforceable under the equitable jurisdiction of the court (d).

§42. *How an equitable mortgage is created.*

The equitable nature of a mortgage may be due either to the fact that the mortgaged property is equitable, or to the fact that the mortgagor has not executed an instrument which is sufficient to transfer the legal estate. In the first case the mortgage, be it never so formal, cannot be a legal mortgage, in the second case it is the informality of the mortgage which prevents it from being a legal mortgage. These alternatives will be discussed separately (e). An equitable mortgage may also be created by a deposit of title deeds (f).

Except in the case of a mortgage by deposit of title deeds (g), an equitable mortgage of an interest in land is not enforceable by action "unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some person thereunto by him lawfully auth-

(c) The judgments in *London County and Westminster Bank v. Tompkins*, [1918] 1 K.B. 515, contain an interesting discussion of the terms "mortgage," "equitable mortgage" and "equitable charge."

(d) 21 Halsbury, *Laws of England*, p. 74. The question of the priority of an equitable mortgage as regards a legal mortgage or another equitable mortgage will be discussed in chapter 7, *Equitable Principles governing Priorities*. As to equitable mortgages generally, see the notes to *Russel v. Russel* in 2 W. & T.L.C. Eq., 85 ff. As to the registration of equitable mortgages in Ontario, see s. 26 of the Registry Act (quoted in §71) and §75.

(e) See §§43 and 44.

(f) See §45.

(g) As to which, see §45.

orized" (*h*), or unless there has been part performance of the contract sufficient to take it out of the statute (*i*).

If a statutory mortgage under the Land Titles Acts may be considered for the present purpose as being equivalent to a mortgage of the legal estate (*j*), equitable mortgages exist under those acts in practically the same circumstances as in the case of land not under the land titles system with this important exception, that a second mortgage in the case of land not under the land titles system is an equitable mortgage, the mortgagor not having the legal estate (*k*), while under the Land Titles Acts a second mortgage is of exactly the same nature as a first mortgage (*l*).

§43. *Mortgage of equitable interest.*

(1) Mortgage of an equity of redemption.

After a mortgagor has made a legal mortgage he has merely a right to redeem and any subsequent mortgage is neces-

(*h*) The Statute of Frauds, 29 Car. 2, c. 3, s. 4; R.S.O. 1914, c 102, s. 5.

(*i*) Oral evidence is admissible to prove part performance, but the mere payment by the lender of the amount agreed to be lent on the security of the land is not sufficient part performance. Ex parte Hooper, 1815, 19 Ves. 477; Ex parte Hall, In re Whitting, 1879, 10 Ch. D. 615, at p. 619; Maddison v. Alderson, 1883, 8 App. Cas. 467, at p. 479; Chaproniere v. Lambert, [1917] 2 Ch. 356 (a case of payment of rent in advance in respect of a parol agreement for a lease of premises of which the lessee had not taken possession).

(*j*) All mortgages under the land titles system are, however, merely charges. See chapter 10, *The Land Titles Acts*, §93, as to the distinction between a statutory mortgage and a legal mortgage.

(*k*) That is, if the land is already subject to a legal mortgage. See §43.

(*l*) See chapter 10, §98, as to the use of the terms "legal mortgage" and "equitable mortgage" under the land titles system, and §97 as to the validity of unregistered charges under that system. Instances of equitable mortgages will be furnished by a number of cases decided under the Land Titles Acts cited in the present chapter

sarily an equitable mortgage (*m*). The effect of a second mortgage is two-fold. It transfers to the second mortgagee the right to redeem the first mortgage and creates a new right in favour of the mortgagor, namely, to redeem the second mortgage. This process can be repeated *ad infinitum* in the case of third and subsequent mortgages (*n*). The mortgages subsequent to the legal mortgage are inoperative at law, but in equity they operate *toties quoties* as mortgages of the mortgagor's equity of redemption.

(2) Mortgage of other equitable interest.

Certain land was bought and paid for by one W. H. Fyfe and at his request was conveyed by the vendor to the purchaser's son, W. G. Fyfe (an infant), to be held by him in trust for the purchaser. The purchaser afterwards signed his son's name to a mortgage of the land, adding his own name as a witness. It was held that the instrument created a valid charge in equity (*o*).

So if a *cestui que trust* under a trust of land purported to mortgage the land or his interest therein without the concurrence of the trustee or other person having the legal estate the mortgage would be equitable (*p*).

(*m*) *Sadler v. Worley*, [1894] 2 Ch. 170, at p. 173; *Aikins v. Blain*, 1867, 13 Gr. 646.

(*n*) See chapter 14, *Transference of the Equity of Redemption*, §131. As to right to the legal estate in the event of the payment of the first mortgage, see chapter 19, *Discharge or Reconveyance*, and chapter 20, *Right to Assignment of Mortgage*.

(*o*) *Dennistoun v. Fyfe*, 1865, 11 Gr.

(*p*) *Memo dat quod non habet*. See chapter 2, *Mortgage at Common Law*, §15. Strahan, *Law of Mortgages*, 2nd ed., 11-12, mentions some exceptional cases, e.g. under a settlement a power to revoke and declare new uses may be vested in a person who has not the legal estate, and under the English Settled Land Act, 1882, an equitable life tenant of settled land may in certain circumstances convey the legal estate. Conversely, the general rule is that a *cestui que trust* may make an equitable mortgage, but this rule is subject to exception in the case of a married woman as regards any

§44. *Mortgage by instrument not sufficient to transfer the legal estate.*

(1) Defect of form.

If a document in the form of a legal mortgage is signed but not sealed, or for any other reason is not sufficient to transfer the legal estate (*q*), it is an equitable mortgage.

An instrument intended to operate as a legal mortgage which fails so to operate for want of some formality is valid as an equitable charge and gives the mortgagee a right to a perfected assurance (*r*).

(2) Agreement to give a mortgage.

An agreement in writing duly signed to execute a legal mortgage is an equitable mortgage, operating as a present charge on the lands described in the agreement (*s*).

An English contract to give a mortgage on foreign land, although the mortgage has to be perfected according to the *lex situs*, is a contract to give a mortgage which—*inter partes*

is to be treated as an English mortgage and subject to such rights of redemption and such equities as the law of England regards as necessarily incident to a mortgage (*t*).

separate property which she is restrained from anticipating. See also Strahan, *op. cit.*, at pp. 56-57.

(*q*) See chapter 2, *Mortgage at Common Law*, §11, as to the requirements of a legal mortgage.

(*r*) *Mestaer v. Gillespie*, 1805 11 Ves. 621.

(*s*) *Rooker v. Hoofstetter*, 1896, 26 Can. S.C.R. 41, 22 O.A.R. 175. As to specific performance of the agreement to give a legal mortgage, and generally as to the enforcement of the equitable mortgages, see §16. As to an agreement to execute a mortgage under the land titles system, see *Gilbert v. Ullerich*, 1911, 4 S.L.R. 56, affirmed *sub nom. Gilbert v. Reeves & Co.*, 4 S.L.R. 97.

(*t*) *British South Africa Co. v. De Beers Consolidated Mines*, [1910] 2 Ch. 502, at pp. 515, 524, S.C. *sub nom. De Beers etc. v. British South Africa Co.*, [1912] A.C. 52; *In re Smith, Lawrence v. Kitson*, [1916] 2 Ch. 206.

(3) Charge on land.

An agreement in writing duly signed, however informal, by which any property is made a security for a debt due or a present advance, creates an equitable charge upon the property (*u*). An equitable charge entitles the holder to payment out of the property, but it does not amount to an agreement to give a legal mortgage, and the strict mode of enforcing it is by sale and not by foreclosure (*v*).

An immediate charge on property has been held to be created by a power of attorney to receive the rents and profits until payment of a loan (*w*), by a deed appointing a receiver of rents and profits to secure an annuity (*x*), by a letter stating that the money intended to be invested on mortgage of certain lands at interest was in the hands of the writer who was interested in those lands (*y*), by a letter authorizing a creditor to retain the debtor's title deeds as security for the debt till the debtor's affairs should be settled (*z*), or by an acknowledgment of a debt with an undertaking to hold the title deeds of a house as security for the same (*a*).

An incorporated company having executed a bond, which though it contained no direct words of charge was evidently

(*u*) *Tebb v. Hodge and Catten*, 1869, L.R. 5 C.P. 73, 18 R.C. 16; and cases cited in the notes, 18 R.C. at pp. 23 ff.; *Rooker v. Hoofstetter*, *supra*; *Matthews v. Cartwright*, 1742, 2 Atk. 347; *Burn v. Burn*, 1797, 3 Ves. 573; *Sawyer and Massey v. Waddell*, 1904, 6 N.W.T. L.R. 45 (a case under the Land Titles Act)

(*v*) *Matthews v. Goodday*, 1861, 31 L.J. Ch. 282; 21 Halsbury, *Laws of England*, 83. See chapter 24, *Action for Foreclosure or Sale*, §231

(*w*) *Sooner v. Sandilands*, 1842, 1 Y. & C. Ch. Cas. 390; *Abbott v. Stratton*, 1846, 3 Jo. & Lat. 603

(*x*) *Cradock v. Scottish Provident Institute*, 1894, 63 L.J. Ch. 15, 69 L.T. 380, 70 L.T. 718.

(*y*) *Re Crowdy*, *Burges v. Crowdy*, 1882, 46 L.T. 71

(*z*) *Fenwick v. Potts*, 1856, 8 DeG. M. & G. 506.

(*a*) *Baynard v. Woolley*, 1855, 20 Beav. 583.

intended to give a lien on the property of the company, it was held that the lien was sufficiently created (*b*).

A deed poll to secure a sum of money, in which the words were "mortgage all that certain parcel of land, &c., to have and to hold the aforesaid land unto the said J. R., his heirs, executors, administrators and assigns," was held sufficient to pass the right of possession to the grantee (*c*).

In an instrument under seal the words "and for securing, &c., the said P.P. doth hereby specially bind, oblige, mortgage and hypothecate the said piece or parcel of land, &c." pass no interest; they only shew an intention to create a charge or lien (*d*).

The intention of the parties as to the terms and extent of the security may be established by parol evidence (*e*). The agreement need not specifically describe the property if it is otherwise sufficiently ascertained or ascertainable (*f*), and the charge created by the agreement may extend to after acquired lands (*g*). A general charge for value on all the existing property of the mortgagor is not void for uncertainty if the property to which it attaches can be ascertained at the time of enforcement, and such a charge is not contrary to public policy (*h*).

§45. *Mortgage by deposit of title deeds.*

If the owner of freehold or leasehold land deposits his title deeds with another person for the purpose of securing the repayment of an advance, an equitable charge is created, and, notwithstanding the Statute of Frauds, the purpose of the

(*b*) *Dundas v. Desjardins Canal Co.*, 1870, 17 Gr. 27.

(*c*) *Vandellinder v. Vandellinder*, 1864, 14 U.C.C.P. 129.

(*d*) *Doe dem. v. Ross v. Papst*, 1853, 8 U.C.R. 574.

(*e*) *Banks v. Whittal*, 1847, 1 DeG. & S. 536.

(*f*) *Smith v. Smith*, 1835, 1 Y. & C. Ex. 338.

(*g*) *Metcalf v. Archbishop of York*, 1836, 1 My. & Cr. 547.

(*h*) *In re Kelcey, Tyson v. Kelcey*, [1899] 2 Ch. 530.

deposit may be shown by oral evidence (*i*). Although, by reason of the prevalence of systems of registration of deeds and registration of titles in this country mortgages of this kind are foreign to our ordinary ideas, our law is the same as the English law, with respect to such mortgages, and an equitable mortgage by deposit may be created notwithstanding that the legal title is outstanding in some person other than the depositor (*j*).

Lord Eldon, after having previously protested against the doctrine, acquiesced in it in 1813 as being settled law (1). The doctrine has been defended, not very satisfactorily, on various grounds including that of part performance (*l*).

A written memorandum duly signed containing an agreement to deposit deeds as security is a valid charge without a deposit (*m*), but an oral agreement for a deposit which is not performed is invalid (*n*). If there is a written memorandum the terms of the deposit must be ascertained solely by reference

(i) *Russel v. Russel*, 1783, 1 Bro. C.C. 269, 2 W. & T.L.C. Eq. 85, 18 R.C. 26.

(j) *Zimmerman v. Spreat*, 1912, 26 O.L.R. 448, 5 D.L.R. 452, and cases there cited. As to deposit of certificate of title under the Land Titles Acts, see *Flalkowski v. Flalkowski*, 1911, 4 A.L.R. 10. In Ontario the Land Titles Act, R.S.O. 1914, c. 126, s. 92, provides as follows:

92. Subject to any registered estates, charges, or rights, the deposit of the certificate of ownership in the case of freehold land, and of the office copy of the registered lease in the case of leasehold land for the purpose of creating a lien on the land to which such certificate or lease relates, shall be deemed equivalent to a deposit of the title deeds of the land.

(k) *Ex parte Kensington*, 1813, 2 Ves. & B. 79, 18 R.C. 30.

(l) See 2 W. & T.L.C. Eq. 86-7; 18 R.C. 27; 21 Halsbury, Laws of England, 79; *Ex parte Broderick*, in *re Beetham*, 1887, 18 Q.B.D. 280, 766.

(m) In *re Carter and Justins*, *Ex parte Sheffield Union Banking Co.*, 1865, 13 L.T. 477.

(n) In *re Beavan*, *Ex parte Coombe*, 1819, 4 Madd. 249, 20 R.R. 294.

to the memorandum, but oral evidence may be given to shew a new agreement with respect to a subsequent advance (o).

Mere possession by a creditor of his debtor's title deeds is not sufficient to create an equitable mortgage without evidence as to the manner in which such possession originated (p). The creditor must shew that the deeds were in fact deposited with him by the debtor, and that the purpose was to create a charge, but if the deposit is proved, the purpose may in the absence of an express charge, be inferred from the circumstances (q).

The deposit must be made either with the creditor or with some third person over whom the debtor has no control (r).

In order to create an equitable charge by deposit of title deeds it is not necessary that all the deeds should be deposited (s). The charge may be good although the conveyance to the depositor is missing (t). *Prima facie* a deposit of deeds creates an equitable charge on all the property comprised in them (u).

If a deposit is made for the purpose of obtaining credit, it will not cover money previously advanced and then due

(o) *Ex parte Kensington, supra*; *Shaw v. Foster*, 1872, L.R. 5 H. L. 340.

(p) *Dixon v. Muckleston*, 1872, L.R. 8 Ch. 155; *Wardle v. Oakley*, 1864, 36 Beav. 27.

(q) 2 Wh. & T.L.C. Eq. 94; 21 Halsbury, Laws of England, 80.

(r) A deposit with the debtor's wife for the creditor is not sufficient. *Ex parte Coning*, 1803, 9 Ves. 115, 18 R.C. 44. But a deposit with the debtor's wife for her own benefit is sufficient. In *re Wallis*, *Ex parte Jenks*, [1902] 1 K.B. 719. A deposit with the debtor's solicitor is sufficient. *Lloyd v. Attwood*, 1859, 3 DeG. & J. 614, 652.

(s) *Ex parte Wetherell*, 1805, 11 Ves. 398, 18 R.C. 35; *Aeme Co. v. Huxley*, 1912, 4 A.L.R. 63 (deposit of transfer without duplicate certificate of title).

(t) *Roberts v. Croft*, 1857, 2 DeG. & J. 1. It follows that several valid equitable mortgages might be created by successive deposits of different deeds. Cf. *Dixon v. Muckleston*, 1872, L.R. 8 Ch. 155.

(u) *Ashton v. Dalton*, 1846, 2 Coll. 565, 18 R.C. 40. See further 2 Wh. & T.L.C. Eq., 98-9, as to the property covered by the mortgage.

(v), unless the intention to cover the past due indebtedness appears from the circumstances (w).

§46. *Remedies of equitable mortgagee.*

An equitable mortgagee by deposit of title deeds or by formal mortgage of an equity of redemption is entitled to enforce his security by foreclosure or sale, but a person who has a mere equitable charge is entitled to sale not foreclosure (x). In the event of foreclosure under an equitable mortgage the judgment or order foreclosing the owner of the equity should either vest the land in the plaintiff or direct the defendant to convey the land to the plaintiff (y).

An agreement to borrow or lend money on mortgage will not be enforced by specific performance so long as it remains executory and neither party to it performs any of its terms. The remedy, if any, is in damages (z). But an agreement to give security (a) for a past debt in consideration of forbearance or for a present actual advance will be enforced by specific performance (b). So also where only part of the amount agreed has been advanced (c).

Where an agreement for a mortgage contains a stipulation that the intended mortgage shall contain the usual clauses, a personal covenant for payment of principal and interest

(v) *Mountford v. Scott*, 1823, Turn. & R. 274.

(w) *In re New, Ex parte Farley*, 1841, 1 Mont. D. & DeG. 683.

(x) See chapter 24, *Action for Foreclosure or Sale*, §231.

(y) See chapter 24, §244.

(z) *Rogers v. Challis*, 1859, 27 Beav. 175, 18 R.C. 278; *Sichel v. Mosenthal*, 1862, 30 Beav. 371, 18 R.C. 282; *Larios v. Bonany y Coeriv*, 1873, L.R. 5 P.C. 346.

(a) Assuming that there is either a memorandum sufficient under the Statute of Frauds or part performance sufficient to take the case out of the statute. See §42, *supra*.

(b) *Alliance Bank v. Broom*, 1862, 2 Dr. and Sm. 289; *Ex parte Jones*, 1825, 4 D. & C. 750.

(c) *Hunter v. Lord Langford*, 1828, 2 Moll. 272.

will be inserted by the court; also a power of sale unless it be implied by statute (*d*). If the agreement is under seal the power of sale may be exercised before the formal mortgage is executed (*e*).

Under an agreement to execute a legal mortgage with such powers and provisions and in such form as the mortgagee may require, the mortgagee is not entitled to insert in the mortgage a clause excluding the operation of the English Conveyancing Act, 1881, s. 17 (abolishing consolidation of mortgages) (*f*).

In the absence of any stipulation to the contrary in an agreement to give a mortgage on lands, the general form and terms of the mortgage must be in conformity with the form provided in the Short Forms of Mortgages Act (*g*).

A mortgagee by deposit of title deeds may enforce the completion of the security by requiring a legal conveyance from his debtor (*h*). An equitable mortgagee who commences an action for foreclosure may obtain an injunction restraining the owner from parting with the legal estate (*i*).

As an equitable mortgagee does not convey the legal estate, the general rule is that an equitable mortgagee is not entitled to bring an action for possession against the mortgagor in occupation of the mortgaged lands (*j*), or, apart from express contract between the mortgagor and the equitable mortgagee,

(*d*) *Saunders v. Milson*, 1866, L.R. 2 Eq. 573; *Cockburn v. Edwards*, 1881, 18 Ch. D. 449.

(*e*) *Re Solomon and Meagher's Contract*, 1889, 40 Ch.D. 508.

(*f*) *Farmer v. Pitt*, [1902] 1 Ch. 954.

(*g*) *Reynolds v. Foster*, 1912, 3 D.L.R. 506, 3 O.W.N. 983.

(*h*) *Ex parte Wright*, 1812, 19 Ves. 255; *James v. James*, 1873, L.R. 16 Eq. 153.

(*i*) *London and County Banking Co. v. Lewis*, 1882, 21 Ch.D. 490.

(*j*) See chapter 22, *Action for Possession*, §212, where the exception in the case of a mortgage which conveys the equity of redemption is mentioned.

CHAPTER V. EQUITABLE MORTGAGES.

payment of rent by tenants in occupation (*k*). The equivalent to the taking of possession is the appointment of a receiver of the rents and profits (*l*).

(*k*) See chapter 15.

(*l*) The characteristics of a floating charge were first established in the case of *In re Panama, New Zealand and North British Royal Mail Company* (*m*). A company with power to issue mortgages, bonds or debentures of any description, and all the moneys arising therefrom, and all the moneys of the company thereon, with a special fund of money borrowed, with the object of carrying out the object and purpose of the debentures was that the company was entitled to carry on its undertaking and deal with its property as if no charge existed until default should be made in payment of principal or interest or the company should be wound up, then in the event of default the debenture holders might have a bill to realize their security, and in the event of the company being wound up, which happened, they had a claim upon all the assets of the company, past and future, and were entitled to be paid out of the assets in priority to the general creditors.

A security of this kind is now known as a floating charge. It has become a common form of security for money lent to a trading corporation and is usually but not necessarily embodied in debentures issued by the company. The term "floating" is used by way of contrast with the term "specific." A specific charge "is one that without more fastens on ascertained and definite property or property capable of being ascertained and defined: a floating charge, on the other

(*k*) See chapter 15, *Lessee of Mortgaged Land*, §142.

(*l*) See chapter 32, *Appointment of Receiver*, §351.

(*m*) 1870, L.R. 5 Ch. 218.

So long as the charge remains floating, and has not become specific, it is liable to be displaced by a specific security created subsequently in favour of a mortgagee, either legal or equitable (*q*), even though the mortgagee has notice of the charge (*r*). This is so even though the creation of a subsequent mortgage is prohibited by the terms of the floating charge, if the mortgagee takes without notice of the prohibition (*s*). On the other hand a floating charge is entitled to priority over a subsequent floating charge, unless it is provided by the earlier charge that it may be displaced by a subsequent charge (*t*).

It has been held in Ontario that a floating charge is not a mortgage of goods and chattels which requires to be registered under the Bills of Sale and Chattel Mortgages Act in order to be good against the creditors of the company (*u*).

(*q*) *Wheatley v. Silkstone and Haigh Moor Coal Co.*, 1885, 29 Ch.D. 715; cf. *Trusts and Guarantee Co. v. Abbott Mitchell Iron and Steel Co.*, 1902, 11 O.L.R. 403.

(*r*) *In re Hamilton's Windsor Ironworks, Ex parte Pitman & Edwards*, 1879, 12 Ch.D. 707.

(*s*) *In re Valletort Sanitary Steam Laundry Co.*, *Ward v. Valletort*, [1903] 2 Ch. 654; *Union Bank of Halifax v. Indian and General Investment Trust*, 1908, 40 Can. S.C.R. 510, at pp. 520 ff.

(*t*) *In re Benjamin Cope & Sons, Marshall v. Benjamin Cope & Sons*, [1914] 1 Ch. 800.

(*u*) *Johnston v. Wade*, 1908, 17 O.L.R. 372. The judgments contain a review of the cases under the English bills of sale acts. If there is a mortgage of specific property to secure payment of the bonds of the company, such mortgage is within the bills of sale acts. *National Trust Co. v. Trusts and Guarantee Co.*, 1912, 26 O.L.R. 279. As to the necessity for registering a floating charge under the English Companies Acts, see case last cited, 26 O.L.R. at p. 286; *Hillingworth v. Houldsworth*, [1904] A.C. 355.

CHAPTER VI.

MORTGAGES OF LEASEHOLD.

- §51. Law of leasehold mortgages, p. 85.
- §52. Mortgage by assignment of unexpired term, p. 86.
- §53. Mortgage by sublease, p. 90.
- §54. Sublease with declaration of trust, p. 90.
- §55. Renewal of mortgaged leasehold, p. 91.

§51. *Law of leasehold mortgages.*

Although the technical division of property which English law makes is that of realty and personalty, yet the division of importance to the law of mortgages is *land* and *chattels*. Leases of land are personal property, but the law of mortgage as to them is in most respects identical with the law of mortgages of freehold. Mortgages of chattels in possession and to a certain extent mortgages of choses in action, on the other hand, are regulated largely by different principles at common law, in equity and under statute (*a*). It seems convenient and proper, therefore, to indicate here the peculiar features of the law of leasehold mortgages, especially as to the way in which such mortgages may be created, notwithstanding that, generally speaking, no attempt is made in this book to discuss the law relating to mortgages of personalty.

It does not appear that the Short Forms of Mortgages Act (*b*) is applicable to a mortgage of leasehold. The statute refers to a "mortgage of land" and "land" is defined as including "freehold tenements and hereditaments." The forms provided by the statute are appropriate only to free-

(*a*) Strahan, *Law of Mortgages*, 2nd ed., p. 8.

(*b*) R.S.O. 1914, c. 117. See chapter 35, *infra*.

hold interests, and there is no provision similar to that contained in the Short Form of Leases Act, that where the premises demised are of freehold tenure the covenants shall be taken to be made with and the proviso for re-entry to apply to the heirs and assigns of the lessor, and where the premises demised are of leasehold tenure the covenants and proviso shall be taken to be made with and apply to the lessor, his executors, administrators and assigns (c).

It is provided by the Mortgages Act, R.S.O. 1914, c. 112, s. 7, that certain covenants on the part of a person who conveys and is expressed to convey as beneficial owner shall be implied in a conveyance by way of mortgage and certain further covenants in a conveyance by way of mortgage of leasehold (d). In the case of a registered charge on leasehold land under the Land Titles Act certain covenants are implied in the absence of an entry on the register negating the implication (e).

A mortgage of leasehold may be created either by assignment of the whole unexpired residue of the term (f) or by sublease (g).

The assignment of a chattel interest in land is void at law unless made by deed (h).

§52. *Mortgage by assignment of unexpired term.*

In *Jameson v. London and Canadian Loan and Agency Co.* (i) the question what constitutes an absolute assignment

(c) Armour, Real Property, 2nd ed. p. 219.

(d) These covenants are set out in chapter 35, *The Short Forms of Mortgages Act*, §384.

(e) R.S.O. 1914, c. 129, s. 32.

(f) S.O. §52.

(g) S.O. §§53 and 54.

(h) R.S.O. 1914, c. 109, s. 9. As to the transfer of the legal estate in a leasehold, see *In re Beachey, Heaton v. Beachey*, [1904] 1 Ch. 67. *In re Moore and Hulm's Contract*, [1912] 2 Ch. 105.

(i) 1897, 27 Can. S.C.R. 435, reversing 25 O.A.R. 602.

of a lease as distinguished from a sub-lease was much discussed. The lease in that case was for a term of twenty-one years, with a covenant on the part of the lessor to grant to the lessee, his executors, administrators or assigns, upon the expiration of that term, a renewal lease for a further term of twenty-one years. The lessee executed in favour of the defendant company a mortgage of "all and singular the said indenture of lease and the benefit of all covenants and agreements therein contained, and all that certain parcel or tract of land and premises," etc., with the following *habendum*

To have and to hold unto the said mortgagees, their successors and assigns for the residue yet to come and unexpired of the term of years created by the said lease, less one day thereof, and all renewals and substituted estates and rights of renewal and other interest of him, the said mortgagor, or which he may hereafter acquire therein. Together with all the outhouses, outbuildings, easements and appurtenances thereto belonging or now in anywise used or enjoyed in connection with the said premises by the said mortgagor.

It was held that the mortgage effected an absolute assignment of the lease, and that the mortgagee was therefore liable for the payment of the rent and the performance of the covenants of the lease, the grounds of the decision being (1) that the premises of the mortgage deed contained an express assignment of the whole term, and if the *habendum* reserved a reversion of one day to the mortgagor the *habendum* was inconsistent with the premises and therefore void for repugnancy, and (2) that the *habendum* did not reserve a reversion to the mortgagor.

Strong, C.J. said (*j*):

"If we are to construe the words 'less one day thereof' as meaning the last day of the term, as we necessarily must do if we are to give effect to the respondent's proposition that there was a reservation of a reversion, we bring these words into direct conflict with other terms of the *habendum* and thus introduce that repugnancy which must be fatal to it. This is apparent in two respects.

The *habendum* expressly includes 'all renewals and substituted estates and rights of renewal, and other interests of him, the said mortgagor, which he may hereafter acquire therein.'

"Now, in the first place, if we turn to the renewal clause in the lease above set forth, we find that no right of renewal is to arise until the expiration of the lease, so that if we are to consider the last day of the term as reserved to the mortgagor the right of renewal, as between the lessor and the lessee and those claiming under the latter, would be in the lessee himself and not in his mortgagees. This shews conclusively, in my opinion, that it was intended by this part of the *habendum* that the mortgagees should have the whole term in them including the last day, an interpretation essential to qualify them to exercise the right of renewal. This is strengthened by the second and other argument drawn from the words 'and other interests of him the said mortgagor,' which are utterly inconsistent with the retention by the latter of a reversion. In order to avoid this repugnancy we must, therefore, construe the reservation of a day generally (without saying the last day of the term), as meaning the first day after the execution of the mortgage. Preston (2 Cony. 125), as high an authority as any which could be quoted on such a point, has this passage:

"In order that an instrument may operate as an under-lease, a reversion must be retained by the former owner, and consequently the under-lease must be for a period less in point of time than the term or estate of the lessor, or when the grant is for the residue of the term of the grantor, there must be an exception of the last day or the last hour, or of some other period of the term. This exception as well as a grant made for part only of the period during which the estate of the grantor is to continue, will leave a reversion in the grantor. It is material that the instrument shall reserve the last portion of the estate for an instrument may, it should seem, operate as an assignment notwithstanding it reserves a portion of the estate, being the first part of it, as in the case of an assignment to hold from a day to come or from an event to happen unless it is to happen after the death of a person by express limitation."

"Thus it will be seen that even as regards an *habendum* which contains no terms inconsistent with a day generally reserved being construed as the last day of the term, Preston considers such a reservation insufficient to give the character of a sub-lease. Therefore we must thus be led to construe such a general reservation would make the *habendum* itself irreconcilable with the express provisions to be found (as in the present case) in the *habendum* clause itself.

"And the same writer (Preston) says

"After the under-lease is made by a term for years the grantor has in point of estate not merely and simply the residue of the

time of his original term; he has the same measure of time, duration of interest and estate as he had prior to the under-lease subject only to that lease. The sole effect of the under-lease is to confer a right to the possession or other beneficial enjoyment of the term granted by the under-lease; and the lessor in the under-lease retains by way of seignior or reversion his original ownership, subject only to the right conferred by the under-lease.'

"This is undoubtedly a correct definition of the estates and relative rights in the term of a lessee and under-lessee. Then how can it possibly be said that an *habendum* which grants, as the present *habendum* does, all the interests of the lessee as well as those he may subsequently acquire, is susceptible, consistently with Preston's definition, of being construed as creating not an assignment, but a mere under-lease?"

If the mortgage is by way of assignment of all the remaining interest in the term, the mortgagee is liable to the lessor for the rent and for the performance of the covenants in the original lease, until he assigns over, even although he does not take actual possession of the demised lands (*k*).

A mortgagee of a lease cannot, by offering to forgo his security, escape liability for breaches of covenants occurring during the time he is assignee, but he may, in the absence of a covenant against assignment by which he is bound, relieve himself from liability for future breaches of covenant by assigning it to any other person, even to a pauper (*l*).

If a lease contains a covenant not to assign or sublet without leave and the lease is absolutely assigned with the consent of the lessor, it cannot be reassigned to the original lessee without the lessor's consent (*m*), but the mortgagee of a lease by way of assignment may, without the lessor's consent, get rid of his future liability on the covenants contained in the lease by executing a discharge of the mortgage and thus releasing the debt and reconveying the security (*n*).

(*k*) *Williams v. Bosanquet*, 1819, 1 Brod. & B. 238, 3 Moore 500, 21 R.R. 585.

(*l*) *Jamieson v. London and Canadian Loan and Agency Co.* (No. 2), 1899, 26 O.A.R. 116, at pp. 124, 132; S.C. 30 Can. S.C.R. 14.

(*m*) *Munro v. Waller*, 1896, 28 O.R. 29.

(*n*) *Jamieson v. London and Canadian Loan and Agency Co.* (No. 2), 1899, 30 Can. S.C.R. 14, affirming 26 O.A.R. 116.

§53. *Mortgage by sublease.*

A mortgagee of leasehold by way of sublease is not liable to the lessor for the payment of the rent or for the non-performance of the covenants in the lease, there being no privity of estate between the mortgagee and the lessor (*o*). For this account a mortgage by way of sublease is preferable to a mortgage by way of assignment of the reversion (*p*) in a case where the rent is relatively large or the covenants are such that the mortgagee is not willing to become liable upon them.

On the other hand, in order that an instrument may operate as a sublease, a reversion must be retained by the lessee (*q*), and the mortgagee is exposed to the danger that the lease may be forfeited by the non-performance by the lessee of the covenants or conditions contained in the lease.

§54. *Sublease with declaration of trust.*

In order that the mortgagee may have the advantages of a mortgage of leasehold in the form of a sublease rather than an assignment of the lease and, as far as possible, obviate the disadvantages of a sublease (*r*), the usual practice is to insert in the sublease a declaration by the mortgagor that he is a trustee of the head term for the mortgagee, subject to the right of redemption, together with a power on the mortgagee's part to remove the mortgagor and appoint another trustee in

(*o*) *Moores v. Choat*, 1839, 8 Sim. 508; *Moore v. Greg*, 1848, 2 Ph. 717; *Hand v. Blow*, [1901] 2 Ch. 721; *South of England Dairies v. Baker*, [1906] 2 Ch. 631.

(*p*) See §52.

(*q*) The sublease must be expressed to be for part only of the period during which the lessee's term is to continue not including the last portion, or there must be an exception of the last day or the last hour or other last portion of the term. See the judgment in *Jameson v. London and Canadian Loan and Agency Co.*, 27 Can. S.C.R. 435, quoted in part in §52.

(*r*) See §§52 and 53, *supra*.

his place and a power of attorney in favour of the mortgagee to assign the immediate reversion. Under these provisions a mortgagee may appoint a nominee of his own to be trustee in the place of the mortgagor and can vest the head term in the new trustee (s).

§55. *Renewal of mortgaged leasehold.*

If the mortgagor of a lease with right of renewal renews the lease or acquires the reversion, either before or after the expiration of the original lease, he will, as a general rule, hold the renewal lease or the reversion subject to the mortgage, and this will be so whether or not he is under obligation to the mortgagee to renew the lease or acquire the reversion. The renewed lease will be considered a graft on the old lease and subject in equity to the mortgage in the same manner as the former lease (t). Where the assignee of a lease, subject to a mortgage thereof, and of the rights of renewal and of purchase given by the lease, exercises the right of purchase, the mortgage becomes a charge upon the fee, and the purchaser has no lien upon the fee for the amount of the purchase money in priority to the mortgage. The mortgagor and those claiming under him cannot assert title to the reversion as against the mortgagee (u).

If a mortgagee renew a lease, the renewal will, as a gen-

(s) 21 Halsbury, Laws of England, p. 127; *London and County Banking Co. v. Goddard*, [1897] 1 Ch. 642. The declaration of trust in favour of the mortgagee does not render him liable to the lessor for the rent and on the covenants of the lease. *Walters v. Northern Coal Mining Co.*, 1855, 5 DeG. M. & G. 629. See also *Armour, Real Property*, 2nd ed., pp. 218-9.

(t) *Moody v. Matthews*, 1801, 7 Ves. 174; *Yem v. Edwards*, 1857, 1 DeG. & J. 598; *Jones v. Kearney*, 1842, 1 D. & War. 134; *Leigh v. Burnett*, 1885, 29 Ch.D. 231; *Hughes v. Howard*, 1858, 25 Beav. 575; *Smith v. Chichester*, 1842, 1 Conn. & Law. 486.

(u) *Building and Loan Association v. McKenzie*, 1897, 28 O.R. 316, affirmed 24 O.A.R. 599, 28 Can. S.C.R. 407.

eral rule, be for the benefit of the mortgagor, subject to the mortgage. As Lord Chancellor Nottingham said:

"The mortgagee doth here but graft upon his stock, and it shall be for the mortgagor's benefit." (v).

And this will be so if the renewal is after the expiration of the lease (w). If, however, the mortgagee obtain a new lease *bona fide*, after giving notice and an opportunity to renew to all parties interested, the renewal lease will not be in trust for the mortgagor (x).

As between mortgagor and mortgagee, each of them owes a duty to the other in respect of the mortgaged property, and in case of one being able, by virtue of his position, to obtain a renewal of a mortgaged lease, there are obvious reasons why it should be held against him, at any rate as a rule, that the renewed lease should be treated as engrafted on the old and forming part of the mortgage security. There is, however, merely a rebuttable presumption of fact that the renewed lease is subject to the mortgage (y).

(v) *Rushworth's Case*, 1676, *Freem. Ch.* 13; *Luckin v. Rushworth*, 1678, *Rep. t. Finch.* 392; *S.C.* 2 *Ch. Rep.* 113; *Darrell v. Whitchoi*, 1669, 2 *Ch. Rep.* 59.

(w) *Rakestraw v. Brewer*, 1728, 2 *P. Wms.* 510.

(x) *Nesbitt v. Tredennick*, 1808, 1 *Ball & B.* 29.

(y) See *In re Biss*, *Biss v. Biss*, [1903] 2 *Ch.* 40, especially at pp. 40-62. In the case of a trustee of a lease who obtains a renewal in his own name there is an irrebuttable presumption of law that the renewed lease is subject to the trust. *Keech v. Sandford*, 1726, *Set. Cas. in Chy.* 61, 2 *W. & T.L.C. Eq.* 706.

PART II.

PRIORITIES.

CHAPTER VII.

EQUITABLE PRINCIPLES GOVERNING PRIORITIES.

- §61. The three equitable rules as to priorities, p. 93.
- §62. Rule 1. Between two equitable mortgages, p. 94.
- §63. Rule 2. Between first legal mortgage and second equitable mortgage, p. 96.
- §64. Rule 3. Between first equitable mortgage and second legal mortgage, p. 97.
- §65. The equitable doctrine of notice, p. 97.
- §66. Constructive notice, p. 98.
- §67. Priority of first mortgagee unless he is estopped or the second mortgagee has the legal estate, p. 100.
- §68. Purchase of legal estate for value without notice, p. 101.
 - (1) Instrument concealed from mortgagee.
 - (2) Subsequent receipt of notice.
 - (3) Subsequently getting in the legal estate.
 - (4) Better right to call for the legal estate.
 - (5) Tacking.

§61. *The three equitable rules.*

The owner of land can create only one legal mortgage of his interest, because he can convey away the legal estate only once, but he may create any number of equitable mortgages relating to the same land, because an equitable mortgage does not involve the conveyance of the legal estate. The question of the order in which two or more mortgages are entitled to rank on property is commonly referred to as the question

of priorities. Such a question may arise between a legal mortgage and an equitable mortgage or between two equitable mortgages. The general principles governing the decision of the question may be stated in the form of three rules (*a*) §62. *Rules as to priorities*

Rule 1. *As between two equitable mortgages the first in time has priority unless the second mortgage, being a mortgage in good faith for value and without notice, has been misled by the fraud or negligence of the first mortgagee.*

This principle is often, somewhat loosely, expressed by the maxim "Where the equities are equal, the first in time prevails." *Qui prior est tempore potior est jure* (*b*).

Equality in this connection means that there is no circumstance affecting the conduct of one of the rival claimants which makes his claim less meritorious than that of the other claimant (*c*). It is well established that if there is no other ground of preference priority in time will prevail (*d*), but

(a) See §§ 63-65, 64. Reference must be had to Chapter V, *The Registry Act*, and chapter 10, *The Land Titles Acts*, as to the extent to which these statutes have affected the application of the equitable principles stated in the present Chapter.

(b) It is perhaps hardly necessary to point out that a different rule of priority applies if the subject matter of the charge is person or chattels, as distinguished from the purpose of this rule. *Taylor v. London and C. Banking Co.* [1901] 2 Ch. 221, at p. 50. In the case of chattels, mortgages of choses in action or assignments of equitable interests in personalty, priority belongs *prima facie* to the claimant who first gives notice to the trustee or holder of the chose or land. *Dearle v. Hall*, 1827 1 R. 1, 10 R.C. 478; *Ward v. Darnley*, [1895] A.C. 369, at pp. 384, 390. In re Dallas, [1904] 2 Ch. 28. The rule in *Dearle v. Hall* does not apply if the subject property is realty, provided that the interest which is the subject matter of the charge or assignment can be placed only in the form of money. *Lloyds Bank v. Pearson* [1901] 1 Ch. 865.

(c) *Bailey v. Barnes*, [1891] 1 Ch. 25, at p. 26, 18 R.C. 510, at p. 520.

(d) *Phillips v. Phillips*, 1862, 1 Dea. F. & J. 208, 10 R.C. 533. In re Samuel Allen & Sons, [1907] 1 Ch. 575 (unpaid vendor of ma-

that the earlier claimant may be postponed by negligence and *a fortiori* by fraud.

In most of the cases the negligence with which the prior mortgagee is charged is negligence relating to the title deeds (e). It is customary for a person who advances money on what is intended to be a first mortgage to receive the title deeds. The possession of the title deeds by a person whom they show or purport to show to be entitled to the land is consequently proof *prima facie* that there is no mortgage. Accordingly, an intending mortgagee should, for his own protection, obtain, if possible, the possession of the title deeds and retain possession of them (f). If the first equitable mortgagee makes no enquiry about the deeds or upon enquiry does not receive a reasonable explanation of their non-production (g), with the result that a subsequent mortgagee is induced by the production of the deeds to advance money under the impression that no prior mortgage exists, the first mortgagee will be postponed to the second (h). Similarly

chinery affixed to the freehold entitled to priority over subsequent equitable mortgagee by deposit of deeds): *In re Morrison, Jones v. Taylor*, [1914] 1 Ch. 59 (a similar case except that the subsequent claim was based on a floating charge); contrast *Hobson v. Gorringe*, [1897] 1 Ch. 182, 12 R.C. 208, in which the subsequent claim was based on a legal mortgage and was held entitled to priority in accordance with rule 3, §61, *infra*; *Hetherington v. Sinclair*, 1915, 34 O.L.R. 61, 23 D.L.R. 639.

(e) E.g. *Rice v. Rice*, 1854, 2 Drew. 73, 10 R.C. 507 (unpaid vendor who had signed a receipt and given up possession of title deeds postponed to subsequent mortgagee by deposit of deeds); *Farrand v. Yorkshire Banking Co.*, 1888, 40 Ch. D. 182 (negligence on part of first mortgagee in failing to get deeds); *Capell v. Winter*, [1907] 2 Ch. 376.

(f) *Parrow v. Rees*, 1840, 4 Beav. 18; *Briggs v. Jones*, 1870, L.R. 10 Eq. 92. Cf. *Strahan, Law of Mortgages*, 2nd ed., pp. 71-72, where the substance of the paragraph in the text is stated somewhat more fully, with references to the cases.

(g) *Dixon v. Muckleston*, 1872, L.R. 8 Ch. 155.

(h) *Clarke v. Palmer*, 1882, 21 Ch. D. 124; *In re Castell & Brown*, [1898] 1 Ch. 135. See also note (c), *supra*.

an unpaid vendor who signs a receipt for the pure use money will be postponed to a subsequent mortgagee who advances money on the faith of the vendor's receipt (i).

§63. *Rules as to priorities.*

(i). 2. *As between a first legal mortgage and a second equitable mortgage, the first mortgage has priority unless the second mortgage, being a mortgagee in good faith for value and without notice, has been misled by (1) the fraud or negligence of the first mortgagee in connection with the taking of the first mortgage or (2) the subsequent fraud (as distinguished from mere negligence) of the first mortgagee.*

Prima facie the first (legal) mortgagee has priority. He may lose his priority by subsequent fraud on his part (j) but not by subsequent conduct amounting merely to negligence (k). Apparently, however, his conduct at the time of taking his mortgage (though it is merely negligent, or at least not fraudulent, and he is not being dishonest) may have priority over a subsequent mortgagee if it is such that it renders possible the creation of a subsequent equally meritorious equity.

(i) *London & Bank v. Bullock*, [1896] 2 Ch. 1. (See also *London & Bank v. Bullock*, [1897] 1 Ch. 376.)

(j) *Hobbs v. Rhodes*, 1700 2 Vern. 141, 18 R.C. 531 (second mortgagee making his advance is misled by the first mortgagee's fraud in the latter's subsequent encumbrance on the property).

(k) *Northern Counties of England Fire Insurance Co. v. Whipp*, 1881 29 C.D. 182, 10 R.C. 507, 516 (negligence in custody of title deeds); *Green v. National Provincial Bank of England*, [1913] 2 Ch. 18. If, however, the first mortgagee gives up the title deeds in order that a charge may be created by deposit of them, he will be postponed to the charge so created even though his authority be exceeded as to the amount raised. *Lockesby v. Temperance, etc., Building Society*, [1895] A.C. 173.

able claim and thus makes it inequitable on the first mortgagee's part to assert his prior claim (*l*).

§64. *Rules as to priorities*

Rule 3. *As between a first equitable mortgage and a second legal mortgage the second mortgage has priority if the latter is a mortgagee in good faith for value and without notice.*

This principle is often expressed by the maxim: "Where the equities are equal the law [that is, the legal title] prevails." The reason of the rule is that if two claims are equally meritorious there is no ground for depriving the claimant who has the legal estate of the priority which that estate gives him (*m*). If, however, the second mortgagee in taking his security is guilty of negligence so gross as to render it unjust to deprive the prior mortgagee of his priority, the second mortgagee will be postponed notwithstanding that he has the legal estate and that has not been guilty of fraud or of negligence amounting to fraud (*n*).

§65. *The equitable doctrine of notice.*

In accordance with the rules as to priorities stated above a subsequent mortgagee cannot gain priority over an earlier

(*l*) *Walker v. Linom*, [1907] 2 Ch. 104, at p.p. 112 ff. (first mortgagee failing to enquire for the title deeds or failing to verify the truth of an excuse made for the mortgagor's not producing and handing over the title deeds).

(*m*) *Pilcher v. Rawlins*, 1872, L.R. 7 Ch. 259, 21 R.C. 728; *Hobson v. Gorringe*, [1897] 1 Ch. 182, 12 R.C. 208. A trustee in breach of trust bought land and mortgaged it to several innocent persons in succession. The first mortgage, having the legal estate, had priority over the claim of the *cestui que trust*, but the latter had priority over the subsequent mortgagees because their mortgages were merely equitable. *Cave v. Cave*, 1880, 15 Ch. D. 639; cf. *Coleman v. London, County and Westminster Bank*, [1916] 2 Ch. 353, at pp. 359, 360.

(*n*) *Oliver v. Hinton*, [1899] 2 Ch. 264 (purchaser of legal estate failing to require production of title deeds postponed to prior equitable mortgagee by deposit of title deeds); cf. *Walker v. Linom*, [1907] 2 Ch. 104, cited in §63, *supra*; *Berwick & Co. v. Price*, [1905] 1 Ch. 632, at p. 640.

claim of which he had notice when he took his mortgage. The claims are not equal, that is equally meritorious, nor could the second mortgagee fairly be said to take in good faith. It is an elementary rule of equity that a purchaser or mortgagee takes subject to any earlier claim of which he has actual notice (*a*).

§66. *Constructive notice.*

It having been decided in equity that a mortgagee takes subject to any earlier claim of which he has actual notice, another step was inevitable, otherwise he would take care not to learn of outstanding equities. Equitable claims are therefore held to be good against a mortgagee who would have known of them if he had acted as a prudent mortgagee acts, that is, if he had made the usual search of title. The mortgagee is obliged not only to be honest but also to be diligent (*b*). This is the equitable doctrine of constructive notice. Actual notice does not, constructive notice does, involve the question as to the negligence or diligence of the mortgagee (*c*).

Constructive notice means that the circumstances sur-

(*a*) *Le Neve v. Le Neve*, 1747, Amb. 436, 2 Wh. & T.L.C. Eq. 487, 18 R.C. 774. A purchaser with actual notice of a prior claim, completes the purchase at his peril. *Jared v. Clements*, 149 E.I. Ch. 428, an extreme case, because the purchaser was convinced by the production of a forged receipt that the prior equitable mortgage had been paid off. Of course a purchaser or mortgagee *per se* takes subject to an earlier legal claim whether he has notice of it or not. As to what is actual notice, see *Harrington v. Spring Creek Cheese Mfg. Co.*, 1904, 7 O.G.R. 719, at p. 325.

(*b*) Cf. *Marland*, *Equity and the Forms of Action*, pp. 118, 122 ff.

(*c*) This is strikingly illustrated by *Kettlewell v. Watson*, 1882, 21 Ch. D. 685, in which it was held that where the total purchase price of a small lot was £12 the purchaser was not affected with constructive notice of an existing equitable right although he had made no search of title and no enquiry about the title deeds and had employed no solicitor.

rounding the taking of a mortgage are such as to induce the court to treat the mortgagee who in fact has no actual notice of an earlier charge as if in fact he had actual notice. The circumstances which will affect a mortgagee with constructive notice are (r):

(a) His knowledge of facts which would naturally suggest the existence of the earlier charge (s).

(b) His failure to make the enquiries which ought reasonably to have been made by him where, if he had made such enquiries, the existence of the earlier charge would have been disclosed to him (t).

(c) Any knowledge received or failure to make enquiries, by his agent as such (u) in connection with the taking of the mortgage, which if the knowledge had been received or the failure had been made by the mortgagee himself would have amounted to actual or constructive notice to him of the earlier charge (v). Notice to the principal in

(r) Cf. Strahan, *Law of Mortgages*, 2nd ed., pp. 66 ff.; H. A. Smith, *Principles of Equity*, 4th ed., pp. 346 ff. In England the law as to notice is now in part declared by the Conveyancing Act, 1882, s. 3. As to the extent to which the statute has changed the law, see *Bailey v. Barnes*, [1894] 1 Ch. 25, at p. 35, 18 R.C. 519, at p. 519; *Taylor v. London and County Banking Co.*, [1901] 2 Ch. 231, at pp. 258, 259; 2 W. & T.L.C. Eq. 207 ff.

(s) *Oliver v. Hinton*, [1899] 2 Ch. 264, at p. 268 (knowledge of the fact that the deeds are not in the possession of the mortgagor, but in that of a third person); *Hunt v. Luck*, [1902] 1 Ch. 428 (knowledge that the rents are being paid to a third person).

(t) *Patman v. Harland*, 1881, 17 Ch.D. 353, 21 R.C. 752 (constructive notice of a restrictive covenant contained in a deed forming part of the claim of title); *Inray v. Oakshette*, [1897] 2 Q.B. 218 (constructive notice of the contents of a deed, notwithstanding that by the contract the purchaser was precluded from requiring production of the title deeds).

(u) As to what is meant by the mortgagee's agent "as such," see *Thorne v. Heard & Marsh*, [1895] A.C. 495, at p. 501.

(v) A solicitor who acts for both mortgagor and mortgagee is the agent of the mortgagee so that his knowledge will usually be imputed to his principal, but if the agent is intending to commit a fraud upon the principal which would be frustrated if the facts were

able claim, it is only in certain circumstances that mere negligence will postpone a legal claim (*q*).

The distinction made between the legal estate and an equitable interest is reasonable, because the legal estate is only an other name for property or ownership, a right *in rem prima facie* good against the whole world, while every equitable interest is a right *in personam*, which is in many respects treated as if it were a right of property but which in essence is only a personal obligation enforceable against definite persons or classes of persons, who either undertook the equitable obligation or succeeded to the title to the property in such circumstances that in equity they are bound by it (*r*).

(8) *Purchase of the legal estate for value without notice.*

The plea of purchase for value without notice is a single plea to be proved by the person pleading it; it is not to be

this solitary class of cases in which the defence of purchase for value without notice, without more, was a complete defence has disappeared. *Ind. Coope & Co v. Emmerson*, 1887, 12 App. Cas. 513; 21 R.C. 762.

(1) See §64, *supra*.

(2) See the keen and illuminating discussion of the nature of equitable estates and interests in Maitland, *Lectures on Equity*, pp. 111 ff., 120 ff., 142 ff. See also Langdell, *Brief Survey of Equity Jurisdiction*, 2nd ed., pp. 4 ff., 251 ff. On the other hand Ewart finds fault with the "absurd deference still paid" to the legal estate. *Estoppel by Misrepresentation*, pp. 252 ff.; 17 C.L.F. 282 (Dec. 1897). For a discussion of the priorities of legal and equitable mortgages respectively, see *Taylor v. London and County Banking Co.*, [1901] 2 Ch. 231; cf. analysis of this case in Maitland, *op. cit.*, 138-141. In 1875 the British parliament purported to take away partially the protective efficacy of the legal estate in the case of mortgages, leaving rival innocent encumbrancers to rank according to the respective dates of their securities. The result was, however, so disastrous to the credit of persons wishing to borrow on mortgage, that a precipitate retreat had to be made, and the old rule was restored in the next session. Underhill, *Changes in the English Law of Real Property during the Nineteenth Century* (republished in *Select Essays in Anglo-American Legal History*, vol. 3, p. 672, at p. 703).

regarded as a plea of purchase for value to be met by reply of notice (a).

The position of a purchaser for value without notice was described by James, L.J. (b) in the following terms:

"I propose to apply myself to the case of a purchaser for valuable consideration, without notice, obtaining, upon the occasion of his purchase, and by means of his purchase deed, some legal estate, some legal right, some legal advantage; and, according to my view of the established law of this Court, such a purchaser's plea of a purchase for valuable consideration without notice is an absolute, unqualified, unanswerable defence, and an unanswerable plea to the jurisdiction of this Court. Such a purchaser, when he has once put in that plea, may be interrogated and tested to any extent as to the valuable consideration which he has given in order to show the *bona fides* or *mahi fides* of his purchase, and also the presence or the absence of notice; but when once he has gone through that ordeal, and has satisfied the terms of the plea of purchase for valuable consideration without notice, then, according to my judgment, this Court has no jurisdiction whatever to do anything more than to let him depart in possession of that legal estate, that legal right, that legal advantage which he has obtained, whatever it may be. In such a case a purchaser is entitled to hold that which, without breach of duty, he has had conveyed to him."

Some special phases of the doctrine of purchaser for value without notice, with special reference to the acquisition of the legal estate, may be stated as follows (c):

1) A mortgagee (d) who at the time of his advance ac-

(a) In *re Nisbet & Potts' Contract*, [1905] 1 Ch. 391, at p. 402; *Union Bank of Halifax v. Indian and General Investment Trust*, 1908, 40 Can. S.C.R. 510, at p. 520. In Ontario it is provided by the Conveyancing and Law of Property Act, R.S.O. 1914, c. 109, s. 39, that it shall not be necessary, in order to maintain the defence of a purchase for value without notice, to prove payment of the mortgage money or purchase money or any part thereof.

(b) *Pilcher v. Rawlins*, 1872, L.R. 7 Ch. 259, at p. 268, 21 R.C. 729, at p. 737.

(c) As already pointed out a purchaser, whether for value or not, of the legal estate, who takes with notice actual or constructive of an earlier equitable claim, takes subject to it.

(d) An absolute purchaser is in the same position, but for the sake of simplicity the propositions are stated with reference to a mortgagee alone.

quires the legal estate in good faith for value and without notice of any earlier equitable claim takes free from such claim, although the person who conveys the legal estate knowingly commits a fraud or breach of trust in conveying it and although the title is acquired through an instrument which discloses the earlier equitable claim, if such instrument is concealed from the mortgagee (c).

2) If a mortgagee has no notice of an earlier equitable claim when he takes his mortgage and advances his money, such priority as he then has will not be affected by the subsequent receipt by him of notice (f), but if he has not the legal estate the subsequent receipt of notice may in some circumstances prevent his acquiring priority by getting in the legal estate.

3) A mortgagee in good faith for value and without notice who at the time of his purchase does not acquire the legal estate and therefore *prima facie* takes subject to any earlier equitable claim may gain priority by getting in the legal estate even after receiving notice of the earlier claim provided that he has not notice that the conveyance of the legal estate to him constitutes a breach of trust on the part of the grantor or that the earlier equitable claimant has the better right to the legal estate.

See *Over v. Rawlins*, 1877 L.R. 7 Ch. 259, 21 R.C. 729.

It is to be noted that his transferee, even with notice, has the same priority. The equitable principle resembles the principle expressed in the Bills of Exchange Act, 1882, which confers upon a holder deriving title to a bill through a holder in due course and who is not himself a party to the fraud or breach of trust, all the rights of the holder in due course as regards all parties to the bill prior to that holder. The equitable principle is subject to an exception similar to that expressed by the words in italics. Where the transferee was himself a party to the suppression of notice of the earlier equitable claim he will not be permitted to take advantage of his own fraud. In *re Stansfeld Colliery Co., Barrow's Case*, 1880, 14 Ch.D. 432, at p. 44.

(d) *Taylor v. Russell*, 11892 L.R. 244, 20 R.C. 544. In other

(4) A mortgagee in good faith for value, and without notice, who at the time of his advance does not acquire the legal estate but obtains the better right to call for it is entitled to priority over another equitable claim (*ch.*), unless the other equitable claimant subsequently actually acquires the legal estate in good faith for value, and without notice of the equitable priority conferred by the better right to call for the legal estate (*i*).

(5) If a mortgagee gets in the legal estate or obtains the best right to call for it in such circumstances that under the next preceding paragraphs he acquires priority on one mortgage, he also acquires priority on any subsequent mortgage for any advances made by him without notice of intermediate encumbrances (*j*). Similarly if a person advances money on

words a mortgagee cannot gain priority by subsequently getting in the legal estate if when he acquires that estate he knows that there is a trust or equity in favour of the person against whom the legal estate is sought to be set up. *S.C.*, [1891] 1 Ch. 8, at p. 9; *18 R.C.* 544, at p. 555; *cf.* 21 *R.C.* 745-747; *Powell v. London and Provincial Bank*, [1893] 1 Ch. 610, at p. 616. It is not certain whether the limitation on the right to gain priority by subsequently getting in the legal estate applies where the grantor has notice of the breach of trust but the grantee has not. 21 *Halsbury, Laws of England*, 328; *Bailey v. Barnes*, [1894] 1 Ch. 25, at p. 37, 18 *R.C.* 510, at p. 521, 21 *R.C.* at p. 746; 2 *W. & T.L.C. Eq.* 127 ff.

(6) This rule as to the better right to call for the legal estate is stated in *Wilkes v. Boddington*, 1707, 2 *Vern.* 599; *Taylor v. London and County Banking Co.*, [1901] 2 Ch. 231, at pp. 262-263. Many of the cases as to a "better right" acquired contemporaneously with the advance are collected in 2 *W. & T.L.C. Eq.* 151-154; at p. 153 it is suggested that an equitable mortgagee who made his advance without notice could rely on a "better right" subsequently acquired, provided that the conditions permitting him to rely on a legal estate actually acquired were fulfilled.

As to the better right to the legal estate when a person pays off the first of two mortgages on the understanding that he is to get the legal estate, see *Crosbie-Hill v. Sayer*, [1908] 1 Ch. 866, and chapter 21, *Merger*, §201.

(7) See next preceding paragraph.

(8) *Lloyd v. Atwood*, 1859, 3 *DeG. & J.* 611, at p. 657. He is

what is in fact a third mortgage but which is taken without notice of the second mortgage, he may purchase the first mortgage and get in the legal estate and thereby become entitled to payment of the third mortgage as well as the first mortgage in priority to the second mortgage (*k*). This latter doctrine is more specifically designated as tacking (*l*).

also entitled to priority for advances made by him on account of the first mortgage after the making of a later mortgage but without notice of it. This subject is more conveniently discussed in connection with the Registry Act in chapter 8, §76.

(*k*) *Marsh v. Lee*, 1670, 2 Vent. 337, 2 W. & T.L.C. Eq. 118, 18 R.C. 523; *Brace v. Duchess of Marlborough*, 1728, 2 P. Wms. 491; *Blackwood v. London Chartered Bank of Australia*, 1874, L.R. 5 P.C. 92, at p. 111; Halsbury, *Laws of England*, 330. The doctrine is known as the creditor's *tabula in naufragio*, a term attributed to Hale, C.J.

(*l*) The doctrine of tacking and other rules mentioned in this chapter are here discussed without reference to the effect of the Registry Act, which is the subject of chapter 8. The doctrine of tacking and that of consolidation are distinguished, and the effect upon them of the Registry Act is discussed in chapter 9. As to the Land Titles Act, see chapter 10.

CHAPTER VIII.

THE REGISTRY ACT.

- §71. Registration of instruments in Ontario, p. 106.
- §72. Effect of not registering, p. 109.
- §73. Effect of registration as notice, p. 113.
- §74. Priority of registration, p. 117.
- §75. Unregistered equitable claims, p. 119.
- §76. Subsequent advances under prior mortgage, p. 122.
- §77. Effect of Registry Act on priorities, p. 125.
- §78. Subrogation of person paying prior mortgage, p. 128.
- §79. Mechanics liens, p. 130.

§71. *Registration of instruments in Ontario.*

The Registry Act, R.S.O. 1914, c. 124, contains the following provisions:

2. In this Act,

(d) "Instrument" shall include every Crown grant, and Order in Council of the Dominion and of Ontario, every deed, conveyance, mortgage, assignment of mortgage, certificate of discharge of mortgage, assurance, lease, bond, release, discharge, power of attorney, under which any such instrument is executed, every bond or agreement for the sale or purchase of land, will, probate of will, grant of administration, caution under the *Devolution of Estates Act* or renewal thereof, municipal by-law, certificate of proceedings in any Court, judgment or order of foreclosure and every other certificate of judgment or order of any Court affecting any interest or title to land, and certificate of amalgamation of loan corporations, every certificate of payment of taxes, granted under the corporate seal of the county, city or town by the treasurer, every sheriff's and treasurer's deed of land sold by virtue of his office, every contract in writing, every order and proceeding in lunacy, bankruptcy, and insolvency, every plan of a survey or subdivision of land, and every other instrument whereby land may be transferred, disposed of, charged, encumbered, or affected in any wise, affecting land in Ontario.

333 Except as herein otherwise provided, and subject to the provisions of the next following section, all instruments mentioned in section 2 may be registered.

34. [Sub-ss. (1) to (6) provide for the registration of instruments without local description of the lands affected].

(7) Except mortgages, encumbrances or liens, made or given by the original nominee of the Crown or any person through whom a person obtaining letters patent for land derived title, no instrument affecting unpatented land shall be registered.

35.—(1) An instrument other than a will, grant from the Crown, Order in Council, by-law or other instrument under the seal of any corporation, certificate of judicial proceedings or an instrument which may be registered by deposit of a certified copy shall not be registered unless accompanied by an affidavit, Form 5, of a subscribing witness, not being a party to the instrument, as to the execution of the instrument by each party who appears to have executed the same, setting forth the name, place of residence, addition, occupation or calling of the witness, and deposing to—

- (a) The execution of the original and of the duplicate, if any, by the party to whose execution thereof he is a witness;
- (b) The place of execution by such party;
- (c) That he knows that the person who executed the instrument in his presence is the party to the instrument as to whose execution thereof he deposes;
- (d) That he is subscribing witness to the instrument.

(2) The affidavit shall be made on or securely attached to the instrument.

(3) An instrument may be registered notwithstanding that the Christian name or names of the subscribing witness making the affidavit is or are only set forth therein by initials or abbreviation, and not in full.

(4) The proof of the execution of an instrument made before the first day of September, 1910, which was sufficient proof for registration before that day, shall be sufficient proof for registration under the provisions of this Act.

36. An instrument, not purporting to convey the land therein mentioned, but which in its nature is, or purports to be, given as a security for the payment of a debt or liability incurred by the person executing the same in respect of a purchase or delivery of any goods or in respect of an advance or loan of money, shall not be registered unless the affidavit of execution, Form 6, states that the instrument was read over and explained to the person executing the same, and that he appeared perfectly to understand the same, and was informed that it might be registered as an encumbrance on the land (a).

(a. An instrument of the kind mentioned in s. 36 is an equitable mortgage. As to the necessity for registration of equitable

47 (1) Unless otherwise provided, every instrument which may be registered under this Act shall be registered upon and by delivery to and deposit with the registrar of the instrument or of a duplicate or other original part thereof with all necessary affidavits, and, unless otherwise provided, every such instrument shall be recorded at full length in the proper book, including every certificate and affidavit accompanying it, except registrar's certificates.

(2) The registrar shall not be bound to receive for registration or to register an instrument unless the proper fees are first paid.

48 (1) When a mortgage has endorsed upon it the words "not to be recorded in full," the mortgage shall not be copied into the registry book.

(2) The mortgage shall be numbered as other instruments are required to be numbered in the registry book in its proper order, and the marginal note made as required by section 53, and the registrar shall at the time of the registration enter opposite the number in the registry book the words "Mortgage not recorded in full" and shall also give the date and names of the parties to the mortgage, [the amount secured, the rate of interest, the amount and dates of payment set out in the proviso for redemption, the time for which the mortgage is to run and such a description of the land therein mentioned as will readily identify the location] (b).

(3) The fee payable for registration not including more than four distinct parcels of land, having a separate heading in the abstract index, shall be \$1.50 (c), and for each additional parcel requiring entry to be made under a separate heading in the abstract index, five cents.

(4) Where the mortgage embraces two or more parcels of land situate in different municipalities in the same registry division, there shall be paid a further fee of twenty-five cents for each municipality after the first.

(5) After the registration of the mortgage, the registrar, upon the application of any person claiming to be interested in the mortgaged land, and upon payment of the prescribed fees, less the amount already paid for registration, shall cause such mortgage to be recorded in full in the registry book (d).

(6) The registrar shall indicate in the abstract index in the mortgages, see §75, *infra*. As to equitable mortgages generally, see chapter 5.

(b) The words enclosed within square brackets were added in 1916 by the statute 6 G. 5, c. 24, s. 20.

(c) In 1918 by 8 G. 5, c. 27, s. 5, the fee payable was changed from \$1 to \$1.50.

(d) The fees payable to a registrar when documents are "recorded in full" are provided for by s. 92 of the statute. In 1918 by

case of the registration of a mortgage endorsed "Not to be recorded in full," that the same has not been recorded in full, and where it has afterwards been recorded in full under the provisions of subsection 5, the registrar shall note in the abstract index opposite the entry, "subsequently recorded in full," giving the date of recording and the number and page of the registry book.

(7) In this section the word "mortgagee" shall include the assignee of a mortgage and a person obtaining any security coming within the terms of section 36, and the word "mortgage" shall include an assignment of a mortgage and an agreement to extend the time for payment of a mortgage or any such security.

58. [This section provides for registration of notices of exercising the power of sale contained in a mortgage.] (c)

59. The registration of an instrument executed before the 1st day of January, 1866, may be made through a memorial or by certificate or otherwise, as provided by the law in force before that date.

62 to 69. [These sections provide for the registration of discharges of mortgage.] (f)

12. Effect of not registering.

It is provided by the Registry Act, R.S.O. 1911, c. 124, s. 71, as follows:

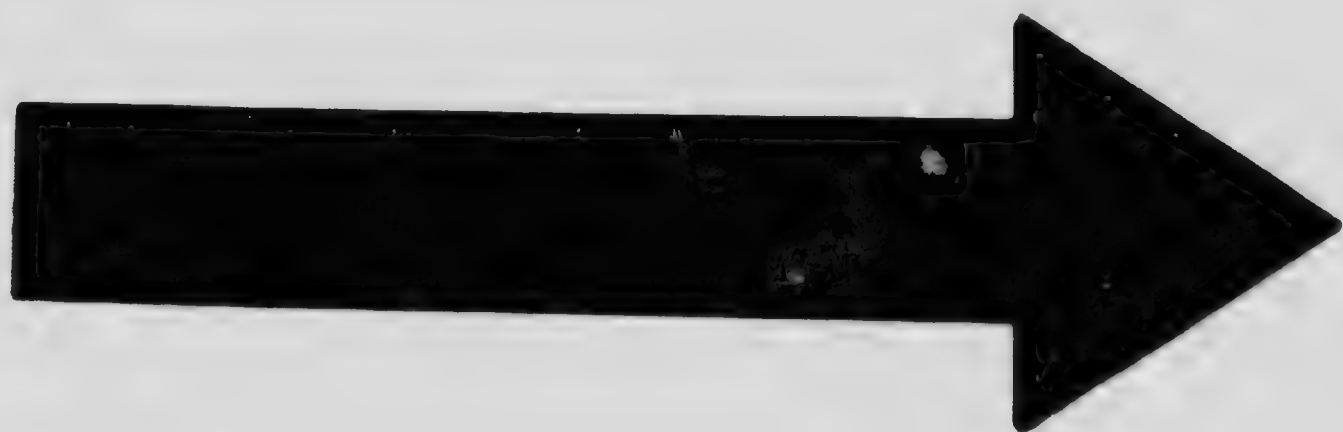
71.—(1) After the grant from the Crown of land, and letters patent issued therefor, every instrument affecting the land or any part thereof shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration without actual notice, unless such instrument is registered before the registration of the instrument under which the subsequent purchaser or mortgagee claims.

(2) This section shall not extend to a lease for a term not exceeding seven years where the actual possession goes along with the lease, but it shall extend to every lease for a longer term than seven years.

S. 47, c. 20, s. 70, it was also provided that the council of any municipality, having a population of 200,000 or more, might by by-law resolve that a tax not exceeding one-tenth of one per centum upon the sum of money secured by each instrument by way of mortgage or charge registered in a registry or land titles office upon lands within the municipality should be paid by the party registering the same.

(c) See Chapter 21, *Sale under Power of Sale*, § 277.

(f) See Chapter 19, *Discharge on Reconveyance*, §§ 183, 184.



Sub-s. 1 re-enacts in principle a provision of the original statute of 1795 (*g*). That statute, however, made no exception in the case of the party claiming under the subsequent registered instrument having actual notice of the prior instrument, and it was only in 1873 that the corresponding section of the statute of 1868 (*h*), was amended by the insertion of the words "without actual notice" after the word "consideration" (*i*). The purpose of the amendment (*j*) was to make the section accord with the predecessor of s. 72 of the present statute which contains an explicit statement of the general principle that priority of registration shall prevail unless the person claiming by virtue of prior registration takes with actual notice of a prior instrument (*k*).

Generally speaking constructive notice (*l*) of an earlier instrument will not affect a person claiming by virtue of prior registration, but the doctrine of constructive notice is preserved in one instance under the Registry Act, namely, under sub-s. 2 of s. 71 quoted above (*m*).

(*g*) 35 G. 3, c. 5; cf. C.S.U.C. 1859, c. 89, ss. 44, 53; *Bondy v. Fox*, 1869, 29 U.C.R. 64, at p. 71.

(*h*) 31 V. c. 20, s. 64.

(*i*) 36 V. c. 17, s. 7.

(*j*) *Peebles v. Hyslop*, 1914, 30 O.L.R. 511, at p. 514, 19 D.L.R. 654, at p. 656. In equity it was already established that a person taking under a registered instrument with actual notice of an earlier instrument was, on the ground of fraud, not entitled to the protection of the statute. *Millar v. Smith*, 1873, 23 U.C.C.P. 47, at pp. 53, 55.

(*k*) See §74, *infra*. As to the same principle in New Brunswick and Nova Scotia, see *New Brunswick Ry. Co. v. Kelly*, 1896, 26 Can. S.C.R. 341, affirming 33 N.B.R. 310; *Tom Gung v. Fong Lee*, 1915, 48 N.S.R. 317, 22 D.L.R. 809.

(*l*) As to the equitable doctrine of constructive notice, see chapter 7, *Equitable Principles governing Priorities*, §66, and *infra*, §§75 and 77.

(*m*) The provision as to registration of leases in its present form dates from 1865: 29 V. c. 24, s. 67. Prior to that date there was a similar provision as to leases not exceeding twenty-one years; C.S. U.C. 1859, c. 89, s. 45.

If a lease is for a term not exceeding seven years and the actual possession goes along with the lease, a subsequent purchaser or mortgagee is put upon enquiry by the possession of the tenant and is affected with constructive notice of such tenant's rights. If the lease is for seven years or longer, or if the possession does not go along with the lease (*n*), and if the lease is not registered, a person claiming under a subsequent registered instrument without actual notice of the lease, takes free from it.

Where a lease made for a term less than seven years contains a covenant for renewal for a further term which, added to the original term, makes a period exceeding seven years, in that case, if the lessee is in possession, the lease does not require registration in order to be valid as against a mortgage of the land which was registered during the original term (*o*).

But where a lessee during the currency of a lease for five years obtained a lease for a further term of four years to commence on the termination of the first lease, it was held that the second lease being unregistered could not prevail against a mortgage registered after the second lease was made but before possession under it began. In order to obtain the protection of the statute there must be not only a present lease but possession under it (*p*).

The exception made by sub-s. 2 of s. 71 in favour of lessees in certain circumstances would no doubt protect the assignee of a lease for a term not exceeding seven years if the actual possession is in accordance with the lease and assignment, because the possession of the assignee would put a subsequent purchaser or mortgagee of the land upon enquiry. The exception would not, however, protect, as against a purchaser or mortgagee of the land, a person claiming under an assign-

(*n*) *Kinnear v. Aspdon*, 1892, 19 O.A.R. 468, at p. 471.

(*o*) *Latch v. Bright*, 1869, 16 Gr. 653.

(*p*) *Davidson v. McKay*, 1867, 26 U.C.R. 306.

ment from the lessor of the right to receive the rents and profits or any other rights of the lessor relating to the land. Such an assignment from the lessor would be an instrument "affecting land" within s. 2, which might be registered under s. 53, of the Registry Act (*q*), and would therefore fall within sub-s. 1 of s. 71.

An unregistered instrument is not by s. 71 rendered void for all purposes. It is valid as between the parties to it (*r*), and is void only as against a person taking for valuable consideration (*s*) and without notice under a subsequent registered instrument (*t*).

A grantee for value, who takes without notice of an earlier conveyance from the same grantor and who registers his conveyance before the registration of the earlier conveyance, may maintain an action to have the conveyance in his favour declared entitled to priority over the earlier conveyance, but he

(*q*) See §71, *supra*. As to what is included in a conveyance of land, see s. 15 of the Conveyancing and Law of Property Act quoted in chapter 1, *Introductory*, §5.

(*r*) One Sootheran, having obtained a conveyance of land from one of the defendants and registered it, executed, more than ten years before action, a reconveyance to both defendants, endorsing thereon a forged certificate of registration, and later, within ten years before action, mortgaged the land to the plaintiffs, who had no notice of the reconveyance. It was held that the reconveyance was void as against the plaintiffs, and that the defendants were not protected by the Limitations Act, because the reconveyance was valid between the parties thereto and no action could have been brought against the defendants before the date of the plaintiffs' mortgage. *McVity v. Tranouth*, [1908] A.C. 60, reversing 36 Can. S.C.R. 455, 9 O.L.R. 105.

(*s*) *Miller v. Halifax Power Co.*, 1915, 48 N.S.R. 370, 24 D.L.R. 29; *Barber v. McKay*, 1890, 19 O.R. 46; *Leech v. Leech*, 1865, 24 U.C.R. 321; *Fraser v. Sutherland*, 1851, 2 Gr. 442.

(*t*) An assignee for the benefit of creditors is not a subsequent purchaser for valuable consideration within the meaning of the statute. *Craig v. McKay*, 1906, 12 O.L.R. 121.

is not entitled to have the earlier conveyance cancelled or to have the registration of it vacated (*u*).

The effect of an award under the Ditches and Watercourses Act, R.S.O. 1914, c. 260, is to subject the lands affected by it to an easement, and the award is therefore an "instrument affecting the land" within the meaning of ss. 2 and 71 of the Registry Act. Therefore, if the award is not registered it is void as against a subsequent purchaser without notice of one of the parcels of land affected thereby (*v*).

An easement or other legal right or interest arising by implication but not expressed in an instrument which can be registered may be good as against a subsequent purchaser or mortgagee without notice claiming under a registered instrument; because it is only an unregistered instrument, not an unregistered right or interest, that is made void by s. 71 in certain circumstances (*w*).

§73. *Effect of registration as notice.*

The original Registry Act of 1795 did not provide either that priority of registration should prevail or that the registration of an instrument should constitute notice to anyone. It was therefore held that where a mortgagee took a subsequent conveyance of the land as security for a further advance (giving a bond to reconvey on payment of the whole debt), he was entitled, by virtue of the doctrine of tacking, to priority as to the whole debt as against a mesne registered

(*u*) *Weir v. Niagara Grape Co.*, 1886, 11 O.R. 700.

(*v*) *Delbridge v. Brantford (Township of)*, 1917, 40 O.L.R. 443, 38 D.L.R. 677, applying and following *Ross v. Hunter*, 1882, 7 Can. S.C.R. 289.

(*w*) See *Israel v. Leith*, 1890, 20 O.R. 361, in §73, *infra*, where the question of rights or interests not expressed in a written instrument but arising by implication is discussed.

encumbrance of which he had no notice (*x*). The law was changed in 1850 by the enactment of a provision specifically directed against the doctrine of tacking and of a provision that the registration of an instrument should in equity constitute notice thereof to all persons claiming any interest in the land subsequent to such registration (*y*).

The Registry Act, R.S.O. 1914, c. 24, s. 75, provides as follows:

75. The registration of an instrument under this or any former Act shall constitute notice of the instrument to all persons claiming any interest in the land, subsequent to such registration, notwithstanding any defect in the proof for registration, but nevertheless it shall be the duty of a registrar not to register any instrument, except on such proof as is acquired by this Act.

Under this section the effect of registration is that even a mere equitable interest expressed in a registered instrument, for instance, under a registered assignment of the benefit of an agreement for the purchase of land, will be good as against a subsequent mortgagee or grantee of the legal estate (*z*).

A subsequent purchaser takes subject to an instrument which is in fact upon the registry, notwithstanding that the proof of execution is defective (*a*) unless perhaps in the case of a registration which is a nullity by reason, for instance, of the absence of any affidavit of execution (*b*).

Registration of a mortgage on lands before the issue of the patent from the crown does not constitute notice to a person

(*x*) *Street v. Commercial Bank of the Midland District*, 1844, 1 Gr. 169. The judgment of Robinson, C.J. contains an elaborate discussion of the doctrine of tacking.

(*y*) 13 & 14 V. c. 63, ss. 4, 17; C.S.U.C. 1859, c. 89, ss. 56, 47. A provision as to tacking is now contained in s. 73 (*infra*, §75).

(*z*) *Cope v. Crichton*, 1899, 30 O.R. 603.

(*a*) *Rooker v. Hoofstetter*, 1896, 26 Can. S.C.R. 41, affirming 22 O.A.R. 175; *Armstrong v. Lye*, 1897, 24 O.A.R. 543, 27 O.R. 511.

(*b*) *Rooker v. Hoofstetter*, 26 Can. S.C.R. at p. 46; *Murchie v. Theriault*, 1898, 1 N.B. Eq. 588.

who afterwards obtains the patent without actual notice of the mortgage (c).

An equitable lien, charge or interest affecting land which is expressed in a written instrument falls within s. 71 (d). If the instrument is not registered it is void as against a subsequent purchaser or mortgagee for value claiming under a registered instrument without notice of the equitable claim. In the case of an equitable claim arising by implication and not expressed in a written instrument which can be registered, special provision is made by s. 73 of the statute (e). There is, however, no similar provision as to legal interests or rights in land arising by implication and not expressed in a written instrument which can be registered, and there would appear to be nothing in the statute to deprive such legal interests or rights of any priority which they may possess apart from the statute. It will be observed that s. 71 in certain circumstances makes void unregistered instruments, not unregistered rights or interests.

Thus, the owner of two adjoining lots of land conveyed one of them, and thereby impliedly granted all those continuous and apparent easements, including rights of drainage and aqueduct, over the other lot, which were necessary for the reasonable use of the property granted and which were at the time of the grant used by the owner of the entirety for the benefit of the part granted. It was held that the implied grant of easements was not within the Registry Act and was good against a subsequent purchaser, without notice, of the servient tenement (f). In the alternative it was held that if the grant was to be considered an express grant by

(c) *Re Reed v. Willson*, 1893, 23 O.R. 552.

(d) See §72, *supra*.

(e) See §75, *infra*.

(f) *Israel v. Leith*, 1890, 20 O.R. 361.

virtue of the Conveyancing and Law of Property Act (*g*), the registration of the conveyance of the dominant tenement was notice to a subsequent purchaser of the servient tenement.

This decision, so far as it relates to an express grant, seems at first sight hardly consistent with what appears to be the general intention of the statute, namely, that a subsequent purchaser shall take subject only to prior claims of which he has actual notice or of which he would receive notice by a search in the registry office, and to that extent the decision is unsatisfactory. A search in the registry office would not, in the case in question, necessarily bring to the actual knowledge of the subsequent purchaser of the servient tenement the existence of the earlier conveyance of the dominant tenement. At most he might learn that his vendor was at one time the owner of both parcels and be put upon enquiry as to the disposition such owner had made of the other parcel. On the other hand, the above mentioned general intention of the statute is perhaps only a deduction from the ordinary operation of the statute, and the decision seems to be in accordance with a strict reading of ss. 71 and 75. The protection which s. 71 confers upon a subsequent purchaser or mortgagee under a registered instrument consists in making void an earlier unregistered instrument, not legal rights or interests arising under an earlier registered instrument, and the provision of s. 75 that registration of an instrument shall constitute notice to a person subsequently acquiring an interest in the land is wide enough to cover rights and interests arising under the registered instrument but not specifically mentioned on its face.

Prior to 1893 it had been held that entry of an instrument in the registry books at full length was necessary in order to constitute registration and that the receipt of the instrument

(*g*) See s. 15 of the statute, quoted in chapter 1, *Introductory*, §5.

by the registrar was not sufficient (b), though the mere omission of the registrar to index an instrument would not deprive it of priority (c). In that year, however, the statute was amended (d) by the addition of the provision which is now contained in R.S.O. 1914, c. 124, s. 80, as follows:

80.—(1) An instrument capable of and properly proved for registration shall be deemed to be registered when and so soon as the same is delivered either personally or by post to and received at his office during office hours by the registrar, or some officer or clerk in his office on his behalf, and thereafter no alteration shall be made by any person in such instrument.

§74. *Priority of registration.*

In 1865 (e) was first enacted the provision which is now R.S.O. 1914, c. 124, s. 72, as follows:

72. Priority of registration shall prevail unless before the prior registration there has been actual notice of the prior instrument by the person claiming under the prior registration.

The word "person" has replaced the word "party" as contained in the original statute. It means one who is "party" to the registered instrument under which priority is claimed over a prior unregistered instrument, and does not include any person who claims under the instrument through subsequent assignments. Therefore where a third mortgagee registered his mortgage before the registration of the second mort-

(b) *Lawrie v. Rathbun*, 1876, 38 U.C.R. 255.

(c) *Lawrie v. Rathbun*, *supra*; *Green v. Ponton*, 1885, 8 O.R. 471; *Jost v. McCuish*, 1893, 25 N.S.R. 519; *cf. Siemens v. Dirks*, 1913, 23 M.R. 581, 14 D.L.R. 149, as to registrar's omission to endorse a certificate of registration.

(d) 56 V. c. 21, s. 93.

(e) 29 V. c. 24, s. 65, re-enacted by 31 V. c. 20, s. 67. Prior to 1865 it was only in a court of equity that relief could be given against a person who claimed by virtue of prior registration but who had actual notice of an earlier instrument. *Millar v. Smith*, 1873, 23 U.C.C.P. 47. Before the creation of the Court of Chancery in 1837 there was no court at all which could give relief in such a case. *Doe dem. Pell v. Mitchener*, 1831, *Draper* 471.

gage, it was held that an assignee of the third mortgage whose assignment was registered subsequent to the registration of the second mortgage, was not "the person claiming under the prior registration" within the meaning of s. 72 (f).

If s. 72 is strictly read, it means perhaps that a party claiming under an instrument who takes without notice and for value but who before registering his instrument receives notice of an earlier unregistered instrument, takes subject to it. In *Millar v. Smith* (g) there are some dicta that this is the effect of the section, but in that case the subsequent purchaser had actual notice of a prior unregistered instrument before the execution of the subsequent conveyance, and the decision was merely that the predecessor of s. 72 enabled a court of law to give equitable relief against a person taking with actual notice and that there should be read into the predecessor of s. 71 the words "without actual notice" (h). In *Peebles v. Hyslop* (i) the same question was discussed as to the effect of notice of an earlier instrument received by a subsequent purchaser after delivery of the subsequent deed but before registration; and the opinion was expressed that relief might be

(f) *Heney v. Kerr*, 1914, 30 O.L.R. 506, 19 D.L.R. 597. In fact the third mortgagee had actual notice of the second mortgage, but the decision, it would seem, would have been the same even if the third mortgagee had taken without notice. He would have had priority over the second mortgagee by the reason of the prior registration of his mortgage, and his assignee would have had the same priority if he likewise had taken without notice and the assignment had been registered before the registration of the second mortgage. The assignee was, however, postponed not only because his assignment was registered after the registration of the second mortgage but because actual notice to him was also proved.

(g) 1873, 23 U.C.C.P. 47; cf. *Peterkin v. McFarlane*, 1881, 9 O.A.R. 429, at p. 465, S.C. *sub nom.* *Rose v. Peterkin*, 1885, 13 Can. S.C.R. 677, at p. 710.

(h) As pointed out above these words were inserted by statute in 1873. See §72, *supra*.

(i) 1914, 30 O.L.R. 511, 19 D.L.R. 654.

given to a purchaser in such a case notwithstanding the wording of s. 72. It was not, however, necessary to decide the question (*j*).

Actual notice in the statute means knowledge, not presumed as in the case of constructive notice but shown to be actually brought home to the party to be charged with it, either by proof of his own admission or by the evidence of witnesses who are able to establish that the very fact of which notice is to be established, not merely something which would have led to the discovery of the fact if an enquiry had been pursued, had been brought to his knowledge (*k*). The mere fact that the grantee under a registered instrument was aware that a person other than his grantor was in possession is not actual notice of such person's adverse claim (*l*).

§75. *Unregistered equitable claims.*

Prior to 1865 the registry acts contained a proviso that nothing therein contained should be construed "to affect the rights of equitable mortgages as now recognized in the Court of Chancery in this province" (*m*), and, generally speaking,

(*j*) Owing to the fact that the prior instrument was not registered at all prior to the judgment in the action, the present s. 71 alone was applicable. If both instruments had been registered it would have been necessary to consider s. 72, whereas under s. 71 the person taking under an instrument without actual notice of an earlier unregistered instrument obtains priority by registration even though he receives notice of the unregistered instrument in the interval between the delivery of his own instrument and its registration. *Peebles v. Hyslop, supra*.

(*k*) *Harrington v. Spring Creek Cheese Mfg. Co.*, 1904, 7 O.L.R. 319, at p. 325.

(*l*) *Roe v. Braden*, 1877, 24 Gr. 589; *Idre v. Starr*, 1909, 19 O.L.R. 471; *secus* if the purchaser has actual notice of the title of the person in possession: *Trinidad Asphalte Co. v. Coryat*, [1896] A.C. 587.

(*m*) 13 & 14 V. c. 63, s. 3; C.S.U.C. 1859, c. 89, s. 53. It was of course only since the creation of the Court of Chancery in 1837 that

any equitable interests not expressed in a written instrument were outside of, and not affected by, the Registry Act (*n*). In that year, however, the statute was amended (*o*). The proviso in question was omitted, but on the other hand the class of instruments which might be registered was enlarged so as to include practically every kind of instrument affecting land, and in addition to the provisions already mentioned, there was enacted the provision which is now contained in R.S.O. 1914, c. 124, s. 73, as follows:

73. No equitable lien, charge or interest affecting land shall be valid, as against a registered instrument executed by the same person, his heirs or assigns; and tacking shall not be allowed in any case to prevail against the provisions of this Act (*p*).

Thus the statute of 1865 not only deprived equitable charges of the exemption from the operation of the Registry Act which they had theretofore enjoyed, but, so far as they might be created by a written instrument, it put them on the same basis as conveyances or mortgages of the legal estate as to registration (*q*). Equitable charges which may arise by operation of equity without any written instrument are governed by s. 73. The section is badly drawn, and it is necessary, in order to give some meaning to the expression "the same party," to supply earlier in the section some words referring to the party against whom the equitable charge may be as-

equitable charges on land were recognised at all in Upper Canada. The priority of equitable charges under the section in question would be governed by the principles discussed in chapter 7.

(*n*) *McMaster v. Phipps*, 1855, 5 Gr. 253; *cf. Oxley v. Culton*, 1899, 32 N.S.R. 256. Apparently legal interests not expressed in a written instrument are still outside of, and not affected by the statute. See *Israel v. Leith*, 1890, 20 O.R. 361, in §73, *supra*.

(*o*) 29 V. c. 24, re-enacted, so far as the present subject is concerned, by 31 V. c. 20.

(*p*) As to the concluding words of the section, with regard to the doctrine of tacking, see chapter 9, §87.

(*q*) See the present statutory provisions quoted in §71, *supra*.

serted. No express provision, it will be noted, is made for the case of notice of the prior equitable charge having been received by the person claiming under the registered instrument. It has been held, however, that the section does not confer priority upon a person claiming under a registered instrument over an equitable charge of which he has actual notice (*r*).

After considerable conflict of opinion in the Court of Chancery it was decided that the provision of the statute of 1865 now in question was retrospective and that it was only actual notice, not constructive notice that would postpone a registered instrument as against a prior equitable charge (*s*). If, however, actual notice is received by an agent in such circumstances that the notice is imputed to his principal, this imputed notice to the principal is regarded as actual notice which is sufficient to postpone the principal's claim under the Registry Act (*t*).

(*r*) *Forrester v. Campbell*, 1870, 17 Gr. 379; *Rose v. Peterkin*, 1885, 13 Can. S.C.R. 677, especially at pp. 701 ff.; S.C. *sub nom.* *Peterkin v. McFarlane*, 9 O.A.R. 429, especially at pp. 4, 9 ff.; *City of Toronto v. Jarvis*, 1895, 25 Can. S.C.R. 237. When the section was originally passed in 1865, the courts of law and equity respectively were still distinct, and the equities in question could be asserted only in a court of equity, but in that court would be subject to the equitable doctrine of notice. This circumstance affords a possible explanation of the failure to provide for the case of notice in this section. In the case of two claimants of the legal estate on the other hand it was necessary to provide for the case of notice in order to obviate the necessity for the parties to resort to a court of equity for equitable relief. Cf. *Strong, J.*, 13 Can. S.C.R. at p. 709.

(*s*) See the cases on both points collected in *Cooley v. Smith*, 1877, 40 U.C.R. 543. As to the statute being retrospective, see also *Building and Loan Association v. Poaps*, 1896, 27 O.R. 470. As to constructive notice generally, see the next preceding chapter. As to actual notice under the Registry Act, see also *Coolidge v. Nelson*, 1900, 31 O.R. 646.

(*t*) *Rose v. Peterkin*, 1885, 13 Can. S.C.R. 677, at pp. 694 ff.; *Green v. Stevenson*, 1905, 9 O.L.R. 671; *Rolland v. Hart*, 1871, L.R. 6

Inasmuch as s. 73 applies to equities arising without any written instrument, the question arises under it how, if at all, a person claiming an equity of this kind can protect himself under the Registry Act. If a mortgagee by deposit of title deeds, an unpaid vendor or other person claiming an equitable lien upon lands is in a position to bring an action to enforce his lien, he may in that action obtain a certificate of *lis pendens* and register it so as to give notice to persons subsequently acquiring interests in the lands (u).

§76. *Subsequent advances under prior mortgage.*

If money is advanced on a first mortgage in instalments, the mortgagee, in making subsequent advances pursuant to the terms of the mortgage, is entitled to act on the supposition that no second mortgage has been made on the property and if a second mortgage has been made he has priority over it with respect to advances made subsequent to the second mortgage but without notice of it up to the full amount for which the first mortgage is expressed to be security. He is not entitled to priority with respect to an advance made after he receives notice of the second mortgage, but as to such advance his security is subject to whatever rights the second mortgagee has at the time of the advance (v).

Ch. 678. As to imputed notice, see chapter 7, *Equitable Principles governing Priorities*, §66.

(u) The Judicature Act, R.S.O. 1914, c. 56, s. 36. In the case of the equitable mortgagee the action might be brought for specific performance of the contract to give a formal mortgage implied in the deposit of title deeds. *Carter v. Wake*, 1877, 4 Ch. D. 605, at p. 606. An equitable mortgagee by deposit may in an action for foreclosure or sale obtain an injunction restraining the mortgagor from conveying the legal estate. *London and County Banking Co. v. Lewis*, 1882, 21 Ch. D. 490; cf. chapter 5, *Equitable Mortgages*, §46.

(v) *Hopkinson v. Rolt*, 1861, 9 H.L.C. 514, 3 R.C. 523; *Bradford Banking Co. v. Briggs*, 1886, 12 App. Cas. 29; *Union Bank of Scotland v. National Bank of Scotland*, 1886, 12 App. Cas. 53. The principle would apply in the case of any conveyance of the equity of redemption subsequent to the first mortgage.

It was decided in *Pierce v. Canada Permanent Loan Co.* (*w*) that the priority of the first mortgagee with respect to an advance made after a second mortgage but without notice of it was not affected by the fact that the second mortgage was registered before the making of such advance (*x*). The registration would under s. 75 of the Registry Act constitute notice to any person "claiming any interest in the land, subsequent to such registration," but the first mortgagee's interest in the land was held to be prior not subsequent to the registration of the second mortgage.

While the case just referred to was pending the legislature of Ontario passed a statute declaring the law for the future, to the same effect (*y*). The statute is now embodied in R.S.O. 1914, c. 124, s. 74, as follows:

74. Every registered mortgage shall as against the mortgagor, his heirs, executors, administrators, assigns and every other person claiming by, through or under him, be a security upon the land comprised therein to the extent of the money or money's worth actually advanced or supplied under the mortgage, not exceeding the amount for which such mortgage is expressed to be a security, notwithstanding that the money or money's worth, or some part thereof, was advanced or supplied after the registration of a conveyance, mortgage or other instrument affecting the mortgaged lands, executed by the mortgagor, his heirs, executors or administrators, and registered subsequently to such first-mentioned mortgage, unless, before advancing or supplying such money or money's worth, the mortgagee in such first-mentioned mortgage had actual notice of the execution and registration of such conveyance, mortgage or other instrument; and the registration of such conveyance, mortgage or

(*w*) 1894, 25 O.R. 671, affirmed, 1896, 23 O.A.R. 516. The first mortgage was registered before the registration of the second mortgage, but the decision would have been the same if the first mortgage had been unregistered and the second mortgagee had had notice of it.

(*x*) A different rule applies as to an advance made after the registration of a lien under the Mechanics and Wage Earners Lien Act, so that on this account a search should be made in the registry office at the time of each advance. See §79.

(*y*) 57 V. c. 34, s. 1.

other instrument after the registration of such first mentioned mortgage, shall not constitute such actual notice.

The same principle would apply to a writ of execution against lands placed in the sheriff's hands (z). A writ of execution binds the lands from the time of the delivery thereof to the sheriff for execution (a). It is subject to mortgages or other interests affecting the land created before the time (b), and attaches only to the real interest of the execution debtor in the lands (c). It has, however, priority over mortgages or other interests subsequently created (d).

Even if a first mortgagee has bound himself without qualification to advance the mortgage money, he is not entitled to priority with respect to advances made after he has received notice of a subsequent mortgage (e) or execution.

(z) It is nevertheless customary and prudent to search both in the registry office and in the sheriff's office at the time of each advance so as to avoid any question as to the mortgagee's having actual notice of a subsequent instrument or execution.

(a) *The Execution Act*, R.S.O. 1914, c. 80, s. 10; *Beekman v. Jarvis*, 1847, 3 U.C.R. 280; *Converse v. Michie*, 1865, 16 U.C.C.P. 167. See also chapter 10, *The Land Titles Acts*, §96.

(b) Even if the execution is placed in the sheriff's hands before the registration of the mortgage. *Russell v. Russell*, 1881, 28 Gr. 419.

(c) *Hamilton Provident and Loan Society v. Gilbert*, 1884, 6 O.R. 434; *In re Trusts Corporation of Ontario and Boehmer*, 1894, 26 O.R. 191; cf. *Case v. Bartlett*, 1898, 12 M.R. 280 (rights of creditor under registered judgment held to be subject to prior unregistered charge); *Oxley v. Culton*, 1899, 32 N.S.R. 256 (execution subject to unregistered interest of *cestui que trust*).

(d) As to the distribution of the amount realized by a sheriff on an execution against lands where there are executions both prior and subsequent to a mortgage, see the *Creditors' Relief Act*, R.S.O. 1914, c. 81, s. 33; *Roach v. McLachlan*, 1892, 19 O.A.R. 496; *Breithaupt v. Marr*, 1893, 20 O.A.R. 689; *Union Bank of Canada v. Taylor*, 1915, 33 O.L.R. 255, 23 D.L.R. 679; *Re Harrison*, 1915, 35 O.L.R. 45, 26 D.L.R. 157.

(e) *West v. Williams*, [1899] 1 Ch. 132. In the case of a building loan or any loan which is to be advanced in instalments, it is a convenient practice to have a collateral unregistered agreement

In *West v. Williams* (f) Lindley, M.R. said:

"When a man mortgages his property he is still free to deal with his equity of redemption in it, or, in other words, with the property itself subject to the mortgage. If he creates a second mortgage he cannot afterwards honestly suppress it, and create another mortgage subject only to the first. Nor can any one who knows of the second mortgage obtain from the mortgagor a greater right to override it than the mortgagor himself has. On the other hand, the first mortgagee has no right to restrain the mortgagor from borrowing money from some one else, and from giving him a second mortgage, subject to the first. Even if the first mortgagee has agreed to make further advances on the property mortgaged to him, the mortgagor is under no obligation to take further advances from him and from no one else, and if the mortgagor chooses to borrow money from some one else, and to give him a second mortgage, the mortgagor thereby releases the first mortgagee from his obligation to make further advances. Whatever prevents the mortgagor from giving to the first mortgagee the agreed security for his further advances releases the first mortgagee from his obligation to make them. A plea of exoneration and discharge before breach would be a good defence at law to an action by the mortgagor against the first mortgagee for not making further advances. If, notwithstanding his release, the first mortgagee makes further advances, with notice of a second mortgage, he is in no better position than any one else who does the like."

§77. *Effect of the Registry Act on priorities.*

It appears from the foregoing (g) that the Registry Act has affected in two ways the equitable principles governing priorities (h). In the first place, under the statute the priority of claims relating to land depends *prima facie* upon the order in which the instruments upon which the claims are based were registered, and not upon the order in which such

between the mortgagor and the mortgagee setting out the conditions on which and the times at which the advances are to be made and reserving to the mortgagee the right to refuse to make any further advances in his discretion. The registered mortgage in that event may be expressed to be security for the total amount to be advanced.

(f) [1899] 1 Ch. 132, at p. 143.

(g) §§72-76. *supra*.

(h) These principles are stated in chapter 7.

instruments were executed or upon the legal or equitable nature of the claims themselves. In the second place, a person who is *prima facie* entitled to priority by reason of the prior registration of the instrument under which he claims is not deprived of the benefit of such priority by the fact that he has constructive notice of an earlier claim, actual notice being required in order to postpone his claim.

Priority of registration, however, may not prevail. A mortgage prior as to execution and registration may be postponed to a mortgage made and registered subsequently.

Thus where A mortgages to B. land which he has agreed to purchase from C. but has not yet purchased, and after registration of the mortgage A. receives a deed of the land from C. and gives a mortgage back to C. for the unpaid purchase money, in that case B's. mortgage although prior in execution and registration is postponed to C's. mortgage. B. under his mortgage takes no estate from A. as A. has none to give, or at most takes an estate by estoppel, and the subsequent conveyance to A. feeds the estoppel only to the extent of A's interest in the land which is that of owner of the equity of redemption; and the Registry Act does not apply (i).

If a person takes for value under a registered instrument he is entitled to priority over an earlier unregistered instrument of which he has not actual notice, and whether he takes a legal or an equitable interest his claim will not be postponed under the Registry Act merely because he has been negligent in failing to enquire about the title deeds (j). Nevertheless the failure to make an enquiry about the deeds is negligence, and it has been held that a solicitor who was negligent in this

(i) *Nevitt v. McMurray*, 1886, 14 O.A.R. 126; *McMillan v. Munro*, 1898, 26 O.A.R. 288.

(j) As to the effect of negligence in postponing an equitable charge, see chapter 7.

respect was liable to his client who advanced money on a mortgage which it afterwards transpired was forged (*k*).

Registration is not a panacea. The mortgage in the last mentioned case was of course a nullity, and its registration did not give it any validity (*l*), nor could any subsequent purchaser claiming through a forged instrument get any protection by reason of the registration of the instrument (*m*).

Again, although the mere fact that a grantee under a registered instrument was aware that a person other than his grantor was in possession does not constitute actual notice of the adverse claim of such person under the Registry Act (*n*) it does not follow that the grantee may not be affected by such person's adverse possession (*p*).

It would appear also that legal rights or interests arising by implication and not expressed in a written instrument are not affected by the Registry Act (*pp*).

English and Irish cases with regard to the effect of regis-

(*k*) *Freehold Loan Co. v. McArthur*, 1888, 5 M.R. 207. It is true that if the solicitor had enquired about the deeds he might have been put off with a plausible excuse and the money might nevertheless have been advanced. The enquiry in that event would not have benefited the client but it might have relieved the solicitor from liability.

(*l*) Cf. *In re Cooper*, *Cooper v. Vesey*, 1882, 20 Ch.D. 611.

(*m*) If a forged instrument is registered under the land titles system, the immediate grantee or mortgagee is in no better position than he would be under the Registry Act, but when his name is entered on the register under the land titles system as the registered owner or mortgagee, a purchaser from him may get a good title. See chapter 10, *The Land Titles Acts*, §92.

(*n*) *Roe v. Braden*, 1877, 24 Gr. 589; cf. §74, *supra*.

(*p*) *Thornton v. France*, [1897] 2 Q.B. 143; *McVity v. Trenouth*, 1906, 9 O.L.R. 105, at p. 110, S.C. 36 Can. S.C.R. 455, reversed (on another point) [1908] A.C. 60. See chapter 26, *Limitation of Actions*, §272.

(*pp*) See *Israel v. Leith*, 1890, 20 O.R. 361, discussed in §73, *supra*.

tration must, of course, be read with due regard to the statutes under which they were respectively decided. Under the Middlesex Registry Act, 1708, and under the corresponding Irish statute of 1707, as under the Ontario statute, a person who takes with actual notice of an earlier unregistered instrument does not gain priority by registering his instrument before the registration of the earlier instrument (*q*). Under the Yorkshire Registries Act, 1884, on the other hand, all assurances entitled to be registered have priority according to the dates of registration, and it is provided that no person shall lose his priority merely in consequence of his having been affected with actual or constructive notice, except in cases of actual fraud (*r*).

§78. *Subrogation of person paying prior mortgage.*

It has been held that if a person advances money to the owner of an equity of redemption for the purpose of paying off an existing mortgage, and pays off the mortgage and registers a discharge of it, in ignorance of an execution against lands placed in the sheriff's hands after the registration of the discharged mortgage, the subsequent mortgagee is entitled on the ground of mistake to be subrogated to the rights of the original mortgagee so as to give him priority over the execution creditor to the amount advanced to pay off the or-

(*q*) *LeNeve v. LeNeve*, 1747, Amb. 436, 2 W. & T. 187, 21 R.C. 774; *Agra Bank v. Barry*, 1874, L.R. 7 H.L. 135, 21 R.C. 784; *cf. In re Monolithic Building Co., Tacon v. The Company*, [1915] 1 Ch. 643.

(*r*) For a discussion of the Middlesex, Yorkshire and Irish statutes, see the notes to *LeNeve v. LeNeve*, *supra*, in 2 W. & T. L.C. Eq. at pp. 243 ff.; 21 Halsbury, Laws of England, 334 ff.; Williams, Real Property, 21st ed., pp. 211 ff., 572 ff. As to the construction of provisions purporting to give priority to a person claiming under a registered title notwithstanding that he takes with notice actual or constructive, see chapter 10, *The Land Titles Acts*, §97.

iginal mortgage (s). The same principle was applied in a case where a purchaser made a search in the registry office and found only two mortgages against the land and on the following day paid off the mortgages and registered the discharges of them together with the conveyance to himself. In the interval between the search and the registration a lien was registered against the land, and it was held that the purchaser was entitled to be subrogated to the rights of the mortgagees whom he had paid off in priority to the lien (t).

The subsequent mortgagee or purchaser may, however, estop himself by his conduct from asserting the right of subrogation (u). In any event the right does not arise unless the payments made on the prior encumbrance or lien are made upon an agreement or with the intention that the person paying is to have a first charge upon the land as security for repayment, and the right is a mere equitable claim which cannot be asserted against a person who takes under a subsequent registered instrument without notice (v).

(s) *Brown v. McLean*, 1889, 18 O.R. 533. It is there pointed out that in ordinary circumstances the registration of the discharge would have operated as a conveyance of the mortgagee's estate to the person next entitled to it, that is, to the execution creditor, but the subsequent mortgagee was held entitled to relief on the ground of mistake. It is to be noted that it is provided by the Registry Act, R.S.O. 1914, c. 124, s. 64 (2) that the registration of the discharge shall not affect the right, if any, of the subsequent mortgagee who has paid off the discharged mortgage to be subrogated to the rights of the mortgagee whose mortgage debt has been so paid. See chapter 19, *Discharge or Reconveyance*, §§183, 184. Cf. chapter 21, *Merger*, §201, as to the presumption of merger in the case of a stranger paying off a mortgage.

(t) *Abell v. Morrison*, 1890, 19 O.R. 669.

(u) *McLeod v. Wodland*, 1893, 25 O.R. 118.

(v) *McMillan v. McMillan*, 1891, 21 O.A.R. 243, 23 O.R. 351; *Imperial Loan and Investment Co. v. O'Sullivan*, 1879, 8 O.P.R. 162; *Watson v. Dowser*, 1881, 28 Gr. 478. A mortgagor or owner of the equity of redemption who redeems a prior charge which is his own debt, or which by contract express or implied he is bound to dis-

§79. *Mechanics liens.*

Provision is made by the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, c. 140, for the registration of a claim of lien upon land for work or services performed or materials furnished in connection with any building or erection upon such land, and it is provided that the lien shall cease to exist unless the claim is registered within thirty days after the completion of the work or services or the furnishing or placing of the last material furnished or placed upon the land, and unless within the further time limited by the statute an action is brought and a certificate thereof is registered (*w*).

It is further provided by §21, as follows:

21 Where a claim is so registered, the person entitled to the lien shall be deemed a purchaser *pro tanto* and within the provisions of *The Registry Act* and *The Land Titles Act*, but except as herein otherwise provided those acts shall not apply to any lien arising under this Act

The concluding words of the section just quoted have not the effect of taking a lien out of the operation of the Registry Act or Land Titles Act so far as the preservation of priority is concerned. As in other cases under the Registry Act, priority of registration prevails in the absence of actual notice, and mere knowledge that building is going on upon the land does not amount to actual notice to a purchaser or mortgagee of the existence of a lien or liens (*x*). If a lienholder delays registration of his lien he does so at the risk of being

charge, cannot keep such charge alive as against a mesne encumbrancer whose encumbrance he is also expressly or impliedly bound to discharge. *Blake v. Beaty*, 1855, 5 Gr. 359. See chapter 21, *Morger*, §201.

(*w*) For the details and qualifications of these provisions, see especially ss. 6, 17, 22-25 of the statute

(*x*) *Sterling Lumber Co. v. Jones*, 1916, 36 O.L.R. 153, 29 D.L.R. 288, and cases there cited.

postponed to the claim of a mortgagee without notice (y), even though the work or service is performed or the materials are supplied before the making of the mortgage (z).

The lienholder has, however, priority over a mortgagee in respect of subsequent advances made by the latter to the extent provided for by s. 14, as follows:

14.—(1) The lien shall have priority over all judgments, executions, assignments, attachments, garnishments, and receiving orders recovered, issued or made after such lien arises, and over all payments or advances made on account of any conveyance or mortgage after notice in writing of such lien to the person making such payments or after registration of a claim for such lien as hereinafter provided.

(2) [Save as herein otherwise provided] where there is an agreement for the purchase of land, and the purchase money or part thereof is unpaid, and no conveyance has been made to the purchaser, he shall, for the purposes of this Act, be deemed a mortgagor and the seller a mortgagee (a).

(3) Except where it is otherwise provided by this Act, no person entitled to a lien on any property or money shall be entitled to any priority or preference over another person of the same class entitled to a lien on such property or money, and each class of lien holders shall rank *pari passu* for their several amounts, and the proceeds of any sale shall be distributed among them *pro rata* according to their several classes and rights.

The lienholder also has priority over a prior mortgagee to the extent provided by s. 8, as follows:

8.—(3) Where the land upon or in respect of which any work or service is performed, or materials are placed or furnished to be

(y) *Charters v. McCracken*, 1916, 36 O.L.R. 153, 29 D.L.R. 756; *Warwick v. Sheppard*, 1917, 39 O.L.R. 99, 35 D.L.R. 98. Under the special provisions of the corresponding Manitoba statute it has been held that a lien holder who registers his claim of lien within the time limited has priority from the date of the commencement of the work or from the placing of the materials, not from the date of registration of the lien, but only to the extent of the materials placed on the land or work done before the mortgage money was advanced. *Robock v. Peters*, 1900, 13 M.R. 124.

(z) *Reinhardt v. Shutt*, 1888, 15 O.R. 325; *Wanty v. Robins*, 1888, 15 O.R. 474.

(a) The words enclosed in square brackets were added in 1918 by 8 G. 7 c. 29, s. 5.

CHAPTER VIII. THE REGISTRY ACT.

encumbered by a prior mortgage or other charge, and the value of the land is increased by the work or service, or by the placing of the materials, the lien shall attach to the increased value in priority to the mortgage or other charge. The selling value of land encumbered by a prior mortgage or other charge, shall be deemed to be increased by the value of the work or service performed upon and of the material furnished on or adjacent thereto (b).

Further provided by s. 9, as follows:

Any of the property upon which a lien is claimed, which is destroyed by fire any money received by reason of the insurance on by an owner or prior mortgagee shall be paid to the owner of the property so destroyed, and shall be available to the benefit of all persons for liens to the same extent as if realized by a sale of such property in an execution to enforce a lien (c).

Prior to the enactment of sub-s. 4, it was held that the priority of the lienholder depended upon his proving that the value of the land had been increased by the work or service or by the furnishing or placing of materials, and that if there was no increase of value, as no prior lien (d). Under sub-s. 4 there appears to be a conclusive presumption of the increase of value to the land by the work or service performed or the materials furnished.

It was added to the statute in 1918 by 8 G. 5, c. 29, s. 4, that the word "land" must be supplied after the word "upon," or "thereupon" must be read "thereupon."

This provision was first enacted in 1896 by 59 V. c. 25, s. 7. At that time it had been held that the claim of a lien was an end so far as the mortgagee was concerned, and the subject of which the lien was claimed was destroyed (d). Bourne, 1896, 27 O.R. 221.

As to the evidence of increased value, see *Cut-Rate Plate* (Solodinski, 1915, 34 O.L.R. 604, 25 D.L.R. 522; *Chapman v. World Building*, 1916, 22 B.C.R. 596, 27 D.L.R. 506; *Witky*, 1916, 35 O.L.R. 555, 28 D.L.R. 346; *White v. White*, 1916, 36 O.L.R. 361, 29 D.L.R. 51; *Northern Trusts Co. v. White*, 1916, 9 S.L.R. 103, 29 D.L.R. 515; *Security Lumber Co. v. White*, 1916, 9 S.L.R. 318, 29 D.L.R. 460; *Warwick v. Sheppard*,

Where a lienholder is added as a party in the master's office in a foreclosure action (e), the priority of the lienholder under s. 8, sub-s. 3, as stated in the master's report, should be expressly limited to the increased value. The statute does not cast upon the mortgagee the duty of realising the lienholder's claim. If the lienholder desires to realise, he must take the necessary steps to do so either by asking for a commission authorising himself to conduct a sale or by making the usual deposit and asking for a sale by the mortgagee. The costs incurred in such a sale ought not to be charged against the mortgagor's interest but should come out of the sum admitted or proved as the increased value (f).

The meaning of s. 8, sub-s. 3, and of s. 14 has been explained by Hodgins, J.A. (g) as follows:

"The provisions of sec. 8 (3) and those of sec. 14 are not necessarily in conflict. Section 8, sub-sec. (3), deals with the land itself, or with an estate or interest in it which is possessed by persons to whom the description of 'claimants' is applied under sec. 2 (c); and prior mortgages or charges under the decisions, mean those mortgages or charges which existed upon the land or those interests before the lien was given, because by sec. 6 the lien attaches then, and it must be at once registered (sec. 22) (h). The lien given to the prior mortgagee or chargee is not, however, given to the

1917, 39 O.L.R. 99, 35 D.L.R. 98; *Marshall Brick Co. v. Yorkers' Colonization Co.*, 1917, 54 Can. S.C.R. 569, 36 D.L.R. 1, 35 O.L.R. 542, 28 D.L.R. 464, *sub nom.* *Marshall Brick Co. v. Irving*.

(e) See chapter 24, *Action for Foreclosure or Sale*, §22.

(f) *Henderson v. Morris*, 1916, 10 O.W.N. 34.

(g) Delivering the judgment of the Court in *Cook v. Kennedy*, 1916, 35 O.L.R. 555, at pp. 559, 560, 28 D.L.R. 346, at pp. 347, 348; cf. *Warwick v. Sheppard*, 1917, 39 O.L.R. 99, 35 D.L.R. 98.

(h) *Kennedy v. Haddow*, 1890, 19 O.R. 240; *Cook v. Kennedy*, 1893, 23 O.R. 545.

land, but upon the value which has been produced by way of increase, over that which the land previously had, by the subsequent doing of the work or the placing of the materials; and this value is not that which represents the actual value or cost of the work, etc., in itself, but the amount which it adds to the selling value.

"Under sec. 14, the lien has priority over mortgage advances made after the lien-holder has notified the mortgagee in writing of his lien or has registered it, and in the latter case the lien-holder is deemed a purchaser *pro tanto* and within the provisions of the Registry Act and the Land Titles Act, the application of which is, however, limited (see, 21).

"Under sec. 14, the priority gained is on the estate of the owner or mortgagee in the land itself, and is positive, and is irrespective of any increased value given to the selling value by the work done, and so it is not within the provisions of sec. 8, although the mortgage has priority by virtue of the Registry Act (i).

" 'Prior' in sec. 8 means before the work, etc., commences, because the land dealt with is described as incumbered land, and the nature of the incumbrance as a prior mortgage or charge. The reason why the increased value is not an element under sec. 14 is well explained by the Chancellor in *Cook v. Belshaw* (j). It is paid for by the mortgagee by the periodical payments which are supposed to reach the lien-holders until they, by the registration of their lien, give notice that they are unpaid. It would be impossible to hold that a mortgage or charge or part of it which became 'prior' by virtue of the Registry Act, under sec. 14, was a 'prior' mortgage or charge' in whole or *pro tanto* under sec. 8. To do so would present the curious spectacle of a mortgage or charge, prior in whole or in part as an incumbrance upon the lands and build-

(i) *McVean v. Tiffen*, 13 O.A.R. 1.

(j) 1893, 23 O.R. 545.

ings, as against the lien, and yet subsequent to it in whole or in part as to the increased selling value. The priority acquired under sec. 14 over the lien is upon the land, including the buildings and erections thereon. Both the lien and the mortgage are, therefore, charges upon the same thing; and, as increased selling value is derived from the buildings or erections, it cannot exist as a separate element under the conditions of that section. The true principle is to treat sec. 8 as confined to those mortgages and charges which existed before work began, by reason of which increased selling value may arise, and sec. 14 as dealing with priorities among competing claims, all arising after work has commenced, and upon land and buildings together."

CHAPTER IX.

CONSOLIDATION AND TACKING.

- §81. The doctrine of consolidation, p. 136.
- §82. The mortgages must be overdue, p. 138.
- §83. Effect of the transfer of the equities or of the mortgages, p. 140.
- §84. Consolidation of mortgages to one mortgagee, p. 141.
- §85. Charges of mortgages to different mortgagees, p. 142.
- §86. Consolidation under the Registry Act, p. 145.
- §87. The doctrine of tacking and the Registry Act, p. 147.
- §88. So-called tacking to avoid circuity of action, p. 149.

§81. *The doctrine of consolidation.*

A mortgagee who holds two or more distinct mortgages upon different parcels of land made by the same mortgagor, if the mortgages are no longer redeemable at law but are redeemable only in equity, may, within certain limits, and against certain persons, "consolidate" them, that is, treat them as one, and decline to be redeemed as to any unless he is redeemed as to both or all (*a*). This doctrine of consolidation (*b*)

(*a*) Cf. *Jennings v. Jordan*, 1881, 6 App. Cas. 698, at p. 700.

(*b*) The doctrine is one of the equitable rules relating to the redemption of mortgages and belongs properly to chapter 3, *Legal Mortgage in Equity*, but it is discussed here in a separate chapter because this arrangement affords a more convenient opportunity of pointing out the effect of the Registry Act upon the doctrine of consolidation and of emphasizing the distinction between the doctrines of consolidation and tacking respectively.

was formulated (c) in *Shuttleworth v. Laycock* (d) in 1681 and in *Pope v. Onslow* (e) in 1692. The doctrine in its simplest and probably its original form is that if a person has mortgaged two separate parcels of land to one mortgagee to secure two different debts, and has made default as to both mortgages so that his estates have become forfeited at law, the debtor is not personally permitted to insist upon paying one debt and redeeming one mortgage without paying the other debt also (e²).

Consolidation is founded on the equitable maxim that *he who seeks equity must do equity*.

"The whole doctrine of consolidation, whatever may have been the particular circumstances under which it has been applied to different cases, arises from the power of the court of equity to put its own price upon its own interference as a matter of equitable consideration in favour of any suitor. At law, independently of a legal estate, when the power of redemption given by original contract is gone, then a person comes into equity to have assistance from the courts of equity and asks to redeem upon what are called equitable considerations, and then the court of equity says:—'This is the price upon which we give you the relief you seek, namely, on your paying all that is due.'" (f)

(c) By Lord Keeper Bridgman. See also the case of *Bovey v Shipwith*, 1671, 1 Cas. in Ch. 201, *infra*, §87, involving both consolidation and tacking. The doctrine of tacking (*infra*, §87) was formulated by Chief Baron Hale, Lord Keeper Bridgman and Baron Rainsford in *Hedworth v. Pimate*, 1662, Hardres 318, and *March v. Lee*, 1670, 2 Ventr. 337, 18 R.C. 523. It is worthy of note that these two doctrines which, in the opinion of modern legislators, show an excessive respect for legal rules, were founded by judges who, though they were sitting in equity tribunals, were in fact rather common lawyers than equity judges. Cf. Jerks, *Short History of English Law*, pp. 220, 221.

(d) 1 Vern. 244.

(e) 2 Vern. 286.

(e²) *Hedg. v. White*, [1896] A.C. 187, at pp. 192 ff., 18 R.C. 264, at pp. 269 ff., where the extension of the doctrine to transferees of the mortgages and to assignees of the equity of redemption is discussed.

(f) *Cummins v. Fletcher*, 1889, 14 Ch.D. 699, at p. 708.

The right of consolidation belongs to the mortgagee, not to the mortgagor. The latter cannot compel the former to consolidate (*g*). It may be asserted by the mortgagee not only in a redemption action, but also in a foreclosure action. The latter is merely an action brought for the purpose of compelling the mortgagor to redeem within a limited time and of depriving him of his equity of redemption if he does not redeem within such time (*h*), and the redemption if it takes place in a foreclosure action is subject to the same equitable conditions as if it took place in a redemption action (*i*).

The right to consolidate, unlike the right to tack, does not depend upon the possession of the legal estate and the right may exist although the securities comprise properties of different natures (*j*). A mortgage of real estate can be consolidated with a mortgage of personal estate (*k*), and a legal mortgage can be consolidated with an equitable mortgage (*l*), and an equitable mortgage with another equitable mortgage (*m*).

§82. *The mortgages must be overdue.*

The right of consolidation exists only as to mortgages with respect to which the mortgagor has made default and has con-

(*g*) *Pelly v. Wathen*, 1851, 1 DeG. M. & G. 16.

(*h*) See chapter 3, *Legal Mortgage in Equity*, §22.

(*i*) *Cummins v. Fletcher*, 1880, 14 Ch.D. 699, at p. 708; *Johnston v. Reid*, 1881, 29 Gr. 292; *Silverthorn v. Glazebrook*, 1899, 30 O.R. 408. The right to consolidate may be asserted by the mortgagee in the master's office on a reference in a foreclosure action. *Ross v. Stevenson*, 1877, 7 O.P.R. 126; *Merritt v. Stephenson*, 1858, 7 Gr. 22. The right may be asserted although the mortgagee has already given notice requiring the mortgagor to pay one of the mortgages. *Griffith v. Pound*, 1890, 45 Ch.D. 553.

(*j*) *Neve v. Pennell*, *Hunt v. Neve*, 1863, 2 Hem. & M. 170, at p. 183; 21 Halsbury, *Laws of England*, 210; *Silverthorn v. Glazebrook*, *supra*.

(*k*) *Tassel v. Smith*, 1858, 2 DeG. & J. 713.

(*l*) *Watts v. Symes*, 1851, 1 DeG. M. & G. 240.

(*m*) *Tweedale v. Tweedale*, 1857, 23 Beav. 341.

sequently lost his legal or contractual right to redeem, so that he is compelled to ask for equitable relief. If default has been made on two mortgages from the same mortgagor, and the mortgagee sells under the power of sale in one of the mortgages and realizes a surplus, he may consolidate the mortgages and apply the surplus on account of the other mortgage, even as against the assignee in bankruptcy of the mortgagor (*o*). But if the mortgaged property is insured in the name of the mortgagor with loss, if any, payable to the mortgagee as his interest may appear, and a loss occurs, the surplus insurance money, after payment of the mortgagee's claim, belongs by law to the mortgagor by virtue of his contract with the insurer, and therefore the doctrine of consolidation does not apply so as to enable the mortgagee to apply the surplus upon another mortgage held by him from the same mortgagor (*p*).

It has been held that the default under the mortgages sought to be consolidated must be a continuing default at the time when an action is brought in which the right of consolidation might be asserted, so that if a mortgagor, before action brought, pays or tenders the whole amount due on one mortgage, he is entitled to a discharge and the mortgagee has no right to consolidate that mortgage with other mortgages with respect to which the same mortgagor is in default (*q*).

(*o*) *Selby v. Pomfret*, 1861, 3 DeG. F. & J. 595. In this case the Lord Chancellor incorrectly uses the word "tack" in the sense of "consolidate." *Pledge v. White*, [1896] A.C. 187, at p. 197, 18 R.C. 264, at p. 274.

(*p*) *Re Union Assurance Company*, 1893, 23 O.R. 627. The result would have been different if the insurance contract had been made between the mortgagee and the insurer, because in that case the mortgagor's claim to the surplus, if any, would have been virtually that of a *cestui que trust* as in *Selby v. Pomfret*, *supra*.

(*q*) *Scottish American Investment Co. v. Tennant*, 1890, 19 O.R. 263. This decision seems to be incorrect on principle, because the mortgagor, having made default, had lost his legal right to redeem, and should not have been allowed to redeem in equity except on equitable terms.

It would seem to follow that if there is no acceleration clause and the mortgagor is in default only as to certain instalments of principal or interest, he may avoid the doctrine of consolidation by paying the arrears before action brought. If there is an acceleration clause in the form given in the schedule to the Short Forms of Mortgages Act (r) and the whole principal has become due by virtue thereof, the result would be the same (s).

§ 3. *Effect of transfer of the equities or of the mortgages.*

The doctrine of consolidation does not apply unless the mortgages sought to be consolidated were all or both made by the same mortgagor (t) in the same right (u), and it is necessary that the equities of redemption are subsequently transferred to the same person (v). On the other hand it is not necessary that the mortgages should originally have been made to the same mortgagee; it is sufficient in certain circumstances that they should be held by the same person when the doctrine is invoked.

(r) See chapter 23, *Action on the Covenant*, §226.

(s) Even after action brought the mortgagor, subject to rules of court, might pay the arrears and costs and be relieved from the consequences of his default. In that event, as the mortgagor's legal estate would be restored by virtue of the statute, there would be no right to consolidation on the mortgagee's part. Cf. *Todd v. Lister*, 1901, 1 O.L.R. 103. A special acceleration clause, not operating under the statute, and not containing any provision relieving the mortgagor from the consequences of default, would have the effect of compelling the mortgagor to pay off the whole mortgage in order to avoid consolidation.

(t) A mortgage made by A cannot be consolidated with a mortgage made by B to the same mortgagee even though B is merely a trustee for A. *Sharp v. Rickards*, [1909] 1 Ch. 109.

(u) A mortgage made by a partner for his own private debt cannot be consolidated with a mortgage made by two or more partners for a partnership debt. *Cummins v. Fletcher*, 1880, 14 Ch.D. 699, at p. 710.

(v) *Sharp v. Rickards*, *supra*.

The cases are divisible into classes which will be considered separately (*w*).

§84. *Case of different mortgages to one mortgagor*

The simpler case is that of two mortgages on two parcels of land made by one mortgagor to one mortgagee.

The right to consolidate is lost if the two parcels originally held by one person are assigned to different persons or if one of the mortgages has ceased to exist.

(1) The mortgagee may consolidate as against the original mortgagor who remains the owner of the equity of redemption in both parcels.

(2) The mortgagee may consolidate as against any person who becomes the owner of the equity of redemption in either parcel subsequently to the making of the mortgages, the assignee in such case taking subject to the mortgages affecting the land, including the consummation of the right of consolidation (*y*). Thus the mortgagee may consolidate as against the heir of the mortgagor (*z*), or his

(*w*) See §§84 and 85, *infra*. The examples stated are those of two mortgages only, but the same principle would apply to three or more mortgages. In each case it is assumed that the conditions already discussed are fulfilled, that is, that the mortgagee of all or both the mortgages has the contractual right to consolidate and that the person seeking to redeem has merely an equity of redemption. The cases are first stated without reference to the Equity Act, and the qualifications effected by that Act are stated separately.

(*x*) In *re Raggett, Ex parte Williams*, 1880, 1 Ch. 104.

(*y*) A mortgagee cannot, as against the assignee of the equity of redemption of one parcel, consolidate with his own mortgage on another parcel created by the same mortgagor after the assignment of the equity of redemption. *Jennings v. Jordan*, 1881, 6 App. Cas. 698; *Pledge v. White*, [1896] A.C. 187, at p. 196, 18 R.C. 264, at pp. 272-3; cf. *Harter v. Colman*, 1882, 19 Ch.D. 650. The subsequent act of the mortgagor cannot prejudice the earlier assignee of the equity of redemption.

(*z*) *Margrave v. Le Hooke*, 1690, 2 Vern. 207.

in bankruptcy (*a*), or as against a puisne mortgagee or purchaser of one of the parcels (*b*).

§85. *Case of mortgages to different mortgagees.*

The more complex case is that of two mortgages made by one mortgagor of different parcels of land to different mortgagees, where the two mortgages subsequently become vested in the same person, whether he be one of the original mortgagees or a third person who takes a transfer of both mortgages.

(1) The holder of the two mortgages may consolidate as against the mortgagor if the latter remains the owner of the equity of redemption of both parcels when the mortgages become vested in the same person. Any subsequent dealings with either parcel are subject to the right of consolidation.

(2) The holder of the two mortgages may consolidate as against a person to whom the equity of redemption of both parcels is transferred by the same deed or as part of the same transaction, if such transferee remains the owner of the equity of redemption of both parcels when the mortgages become vested in the same person. The transferee in such case simply stands in the shoes of the mortgagor, subject to the same equitable right of consolidation in the event of the subsequent union of the two mortgages in the hands of one holder (*c*).

(*a*) *Pope v. Onslow*, 1692, 2 Vern. 286. This point was doubted by Lord Hardwicke. *Ex parte King*, 1750, 1 Atk. 300; *Ashburner*, Equity, 302.

(*b*) *Ex parte Carter*, 1773, Amb. 733; *Watt v. Symes*, 1851, 1 DeG. M. & G. 240, at p. 245. This was doubted by Lord Northington in *Willie v. Lugg*, 1761, 2 Ed. 78; *Ashburner*, Equity, 302.

(*c*) It is true that in such case the result is that the assignee of the equity of redemption is held to take subject to a mere possibility of an equity, whereas the general rule, which governs the case next discussed, is that the assignee takes subject only to an equity existing at the time of the assignment. The special rule

(3) The holder of the two mortgages may consolidate as against different transferees of the equities if the union of the two mortgages in one hand takes place before the severance of the equities has been effected by the transfer of either of the equities. If either of the equities is transferred before the union of the mortgages, the transferee of the equity takes free from the right of consolidation (*d*).

In *Mills v. Jennings* (*c*) Cotton, L.J. in delivering the judgment of the Court of Appeal said:—

"As a mortgagor cannot be allowed to prejudice the rights of his mortgagee by any dealings with the equity of redemption of the estate in mortgage, it has been held that a purchaser or mortgagee of one of two estates already in mortgage is, as regards the consolidation of the mortgages, in the same position as the original mortgagor—that is to say, the purchaser of an equity takes subject to all the equities affecting the person through whom he claims. It is in this case contended that this will apply even though one of the mortgages which it is sought to consolidate was not created till after the mortgagor had sold the equity of redemption of the estate owned by the person claiming to redeem. In our opinion, independently of authority, this contention cannot prevail. It seeks to affect in equity, and by virtue of a rule the creation of equity, the right of a purchaser by the subsequent act of his vendor. That this will be the result will appear from considering from what acts of the purchaser the right of consolidation arises. It is the circumstance of the mortgagor having created two mortgages on two different estates which gives the mortgagee of either estate as soon as

applicable to the assignment of the equity of redemption of both properties has however been established since the decision in *Vint v. Padget*, 1858, 2 DeG. & J. 611, which was followed in *Pledge v. White*, [1896] A.C. 187, 18 R.C. 265. Cf. *Selby v. Pomfret*, 1861, 3 DeG. F. & J. 595, in which a mortgagee of one parcel with notice of the mortgagor's bankruptcy purchased a mortgage of another parcel made by the same mortgagor and was held entitled to consolidate as against the trustee in bankruptcy.

(*d*) Because the right of consolidation at the time of the transfer is a mere possibility, not an existing equity, either consummate or inchoate. *Harter v. Colman*, 1882, 19 Ch.D. 630; *Minter v. Carr*, [1894] 3 Ch. 498; *Fraser v. Nagle*, 1888, 16 O.R. 241; *Hughes v. Britannia Permanent Benefit Building Society*, [1906] 2 Ch. 607.

(*c*) 13 Ch. D. 639, at p. 646; affirmed on appeal, *sub nom.* *Jennings v. Jordan*, 1881, 6 App. Cas. 698.

the second mortgage is created a right to get both mortgages into his hands, and to hold both till the debt due on either is paid. The principle which allows as against a subsequent purchaser of a mortgage the right of consolidation is that the mortgagor cannot by any dealing with the equity of redemption prejudice the rights of the mortgagee. This can only apply to rights already existing and arising from acts already done by the mortgagor. The same principle will prevent the mortgagor from throwing a greater burden on the purchaser of his equity of redemption by any act done subsequently to the sale or mortgage of this estate. It is true that the purchaser of one estate may get in and consolidate the mortgages on another estate against a purchaser of the equity of redemption of one of the estates, even though at the time of the purchase the mortgages were vested in different persons, provided both mortgages existed previously to the sale of the equity of redemption of one of the estates. But this equity arises out of acts done before the sale of the equity of redemption previously to the sale of the equity of redemption—namely, the union of the mortgages on both estates in one person—is an act of persons who are no parties to the sale of the equity of redemption and not bound to the purchaser by any act done consistent with the claim to consolidate. In our opinion the purchaser of an equity of redemption takes subject to the mortgages as arise from acts previously done by his vendor, and is not subject to these equities, though acts of persons other than the vendor may be necessary to give rise to the equity. But in our opinion he is not subject to any equity arising from acts done by his vendor subsequently to the sale, and therefore as against a purchaser of an equity of redemption of an estate there can be no consolidation of a mortgage subsequently created on another estate."

In *In re Walhampton Estate* (f) the owner of estate A executed a voluntary settlement of the estate, and then mortgaged it. Afterwards he mortgaged estate B, and both mortgages came into the hands of the same person who claimed to consolidate them as against the persons claiming under the settlement. Kay, J. in delivering judgment said:

"I consider the claim for consolidation on the part of the mortgagees to be utterly unfounded. It is true that the voluntary settlement is void as against the subsequent mortgagee to the extent of the mortgage. But because that mortgagee afterwards obtains from the mortgagor another security is he to be allowed to consolidate

(f) 1884, 26 Ch.D. 391, at p. 393.

his two securities, so as to throw on the estate, subject to the settlement, any part of the sum which may be owing to him beyond that originally charged thereon? In my opinion he clearly cannot do so. The Statute of Elizabeth gives him no such power. It makes a voluntary settlement fraudulent and void as against a subsequent purchaser, but it only makes it void to the extent of the purchaser's interest therein. No authority has been cited which bears out the contention of the mortgagees in this case, and I therefore hold that the settled estate is liable only to the extent of the sums charged thereon by the mortgages expressly affecting it."

Fry, J. (afterwards L.J.) in the course of his judgment in *Harter v. Colman* (g) said:--

"Taking the case of an assignment of an equity of redemption, must the assignee of the equity of redemption do all such equities as his assignor would have been liable to at the time when the redemption action was brought, or must he perform, and hold subject to, those equities only to which his assignor was liable at the date of the assignment? If it be the former, the assignee of the equity of redemption of one of the estates would be in no better position than the assignor, if he had remained the owner of both of the equities of redemption. If, on the other hand, the assignee takes subject to those equities only which were subsisting against his assignor at the time of the assignment of the equity of redemption, he will be in a better position than the assignor, because the union of the two mortgages in the case supposed takes place subsequently to the assignment, and the equity which arises from the union, therefore, originates subsequently to the assignment. . . . I may refer by way of analogy to the case which I mentioned in the course of the discussion, *Watson v. Mid-Wales Railway Company* (h), as illustrating what I understand to be the rule applicable to the assignment of *choses in action*, viz., that the assign of a *chose in action* takes it subject to all equities subsisting at the time of the assignment, and not to equities which arise subsequently, and which did not exist at that time."

§86. Consolidation under the Registry Act.

In England by the Conveyancing Act, 1881, s. 17, the doctrine of consolidation is excluded as to mortgages made on or after the first day of January, 1882, if and so far as a

(g) 1882, 19 Ch.D. 630, at p. 633.

(h) 1867, L.R. 2 C.P. 593.

contrary intention is not expressed in the mortgage deeds or one of them (*i*).

In Ontario the propositions already stated must be qualified in consequence of the Registry Act. The right of consolidation being merely an equitable right it is subject to be defeated by the provision of s. 73 that "no equitable lien, charge or interest affecting land shall be valid, as against a registered instrument executed by the same person, his heirs or assigns." (*j*) The right of consolidation cannot therefore be asserted as against the assignee for value (*k*) of the equity of redemption of one parcel who takes without notice of the existence of the mortgage made by the same mortgagor and held by the same mortgagee upon another parcel and whose assignment is duly registered (*l*). On the other hand if the two mortgages are registered and a person subsequently takes a conveyance or mortgage of both parcels, his search in the registry office will disclose the fact that both parcels are subject to mortgages made by the same mortgagor and held by the same mortgagee and the purchaser or mortgagee of the two equities will therefore take with notice of and subject to the right of consolidation (*m*).

(*i*) *Bird v. Wenn*, 1886, 33 Ch.D. 215; *Farmer v. Pitt*, [1902] 1 Ch. 954.

(*j*) See chapter 8, *The Registry Act*, §75.

(*k*) *Johnston v. Reid*, 1881, 29 Gr. 293. In this case an execution creditor obtained a second mortgage of one parcel in consideration of time being given for payment and registered his mortgage. As against him it was held that a prior mortgagee of both parcels could not consolidate, although if the second mortgage had not been given and registered, the mortgagee might have consolidated as against a mere execution creditor.

(*l*) *Brower v. Canada Permanent Building Association*, 1877, 24 Gr. 599; *Miller v. Brown*, 1883, 3 O.R. 210. It is assumed, of course, that there is nothing on the abstract of title of the parcel purchased, to disclose the existence of the mortgage on the other parcel.

(*m*) *Dominion Savings and Investment Society v. Kittridge*, 1876, 23 Gr. 631, at p. 635. As to the effect of registration as notice, see chapter 8, *The Registry Act*, §73.

§87. *The doctrine of tacking and the Registry Act.*

The doctrine of consolidation is not affected by the provision of s. 73 of the Registry Act that "tacking shall not be allowed in any case to prevail against the provisions of this Act" (n). Even as to tacking the provision in question is unnecessary and therefore inoperative. No doctrine legal or equitable can "prevail against," that is, override, a statute passed by competent authority containing provisions which are inconsistent with the doctrine, and, as will be seen presently, the fact that successive mortgages are registered will usually exclude the doctrine of tacking. In any event the provision as to tacking has no application to the doctrine of consolidation. Tacking and consolidation are quite distinct and depend upon different principles, although the terms have sometimes been confused in the cases.

Consolidation is a doctrine relating to the equity of redemption. It is an illustration of the maxim that *he who seeks equity must do equity*, and arises where two or more mortgages are made by the same mortgagor on different properties and held by the same mortgagee or assignee.

Tacking properly so-called is a doctrine relating to priorities between competing mortgagees of the same property (o).

(n) *Dominion Savings and Investment Society v. Kittridge*, 1876, 23 Gr. 631. As to the provision of the Registry Act quoted in the text, see chapter 8, *The Registry Act*, §75.

(o) The very early case of *Bovey v. Skipwith*, 1671, 1 Cas. in Ch. 201, in the reign of Charles II, affords an illustration both of consolidation and of tacking. There was (1) a mortgage (apparently) with conveyance of the legal estate of two properties; (2) an assignment of the equity of redemption of the two properties to a second mortgagee; (3) a third mortgage of one of the properties only without notice of the second mortgage. The third mortgagee bought and took a transfer of the first legal mortgage. It was held, first, that he might tack his equitable third mortgage to the first mortgage, so as to gain priority over the second mortgage, and, secondly, that having done so he might consolidate his third mortgage on one property with the first mortgage on both properties and

It is an illustration of the maxim that *where the equities are equal, the law shall prevail*, and arises where a third mortgage is taken without notice of the second. If the third mortgagee gets in the legal estate by purchasing the first mortgage, he is allowed to "tack" the third mortgage to the first mortgage, and obtains priority as to both over the second mortgage. The doctrine is the logical result of the priority *prima facie* accompanying the possession of the legal estate. The first mortgage is of course entitled to priority, and the legal estate of the mortgagee combined with the fact that he took the third mortgage for value in good faith and without notice gives him priority as to that mortgage also over the equitable interest of the second mortgagee (*p*).

It is essential that the person who seeks to gain priority over a second mortgage by virtue of the doctrine of tacking should have taken the third mortgage without notice of the second mortgage (*q*). If he takes without notice and registers his mortgage before the registration of the second mortgage, he gains priority by virtue of the Registry Act (*r*). If the second mortgage is registered first, its registration operates as notice to the third mortgagee and the doctrine of tacking is therefore excluded (*s*). If neither mortgage is registered

hold the two properties as against the second mortgagee until all that was due to him on both securities should be satisfied. *Pledge v. White*, [1896] A.C. 187, at pp. 193-194, 18 R.C. 264, at pp. 270-271.

(*p*) The equitable rules as to priorities between legal and equitable mortgages respectively are discussed in chapter 7, and in §68 the doctrine of tacking is stated as one of the phases of the wider doctrine of purchase for value without notice. The unfortunate second mortgagee who loses his priority as a result of the doctrine of tacking receives at least some words of sympathy in *Federal Life Assurance Co. v. Stinson*, 1906, 13 O.L.R. 127, at p. 141, S.C. *sub nom.* *Scott v. Swanson*, 1907, 39 Can. S.C.R. 229.

(*q*) See chapter 7, §68.

(*r*) See chapter 8, §72.

(*s*) See §73. Cf. *Pierce v. Canada Permanent Loan Co.*, 1894, 25 O.R. 671, at p. 677, s.c. 23 O.A.R. 516.

there is nothing in the act to exclude the doctrine of tacking, but if the mortgages are registered their priorities are governed by the act without reference to the doctrine of tacking (t).

§88. *So-called tacking to avoid circuity of action.*

Closely related to consolidation and depending like it on the principle that *he who seeks equity must do equity* is another set of cases which are commonly called tacking (u), but which do not raise any question of priority between different mortgagees of the same property and are therefore not affected by the provisions of the Registry Act. In order to avoid circuity of action, a mortgagor's heirs or devisees were not permitted to redeem the mortgage without also paying a bond or judgment debt owing by the mortgagor because the equity of redemption in the hands of the heirs or devisees was assets for the payment of such a debt (v). So, since lands are assets for the payment of all kinds of debts, simple contract debts may be tacked as against the heirs or devisees (w), and now that real estate devolves upon the personal representative of a deceased person, the same right of tacking exists against the personal representative (x). But this tacking is allowed only for the purpose of avoiding circuity of action and it cannot be made use of so as to gain priority as to unsecured debts over

(t) The same principle would apply in the case of charges or mortgages made under the Land Titles Acts. *Reeves v. Konschur*, 1909, 2 S.L.R. 125.

(u) See 21 Halsbury, Laws of England, p. 333; 2 W. & T.L.C. Eq. 143-144.

(v) *McLaren v. Fraser*, 1870, 17 Gr. 533.

(w) *Rolle v. Chester*, 1855, 20 Beav. 610; *Thomas v. Thomas*, 1856, 22 Beav. 311.

(x) 21 Halsbury, *op. cit.*, p. 333.

other creditors (*y*). Debts which have not been incurred on the security of the land cannot be tacked either as against the mortgagor or persons claiming under him *inter vivos* (*z*).

(*y*) *Pile v. Pile*, 1875, 23 W.R. 440; *Heams v. Bance*, 1748, 3 Atk. 630; *Adams v. Claxton*, 1801, 6 Ves. 226; *Rolfe v. Chester*, *supra*; *Irby v. Irby*, 1855, 22 Beav. 217.

(*z*) *Coleman v. Winch*, 1721, 1 P. Wms. 775; *Troughton v. Troughton*, 1748, 1 Ves. Sen. 86; *Adams v. Claxton*, *supra*; *Richardson v. Horton*, 1843, 7 Beav. 112, at p. 123; *Ferguson v. Frontenac*, 1874, 21 Gr. 188.

CHAPTER X.

THE LAND TITLES ACTS.

- §91. Registry Acts and Land Titles Acts, p. 151.
- §92. Registration of deeds and registration of titles, p. 154.
- §93. Mortgages under the land titles system, p. 156.
- §94. The registered estate and its priority, p. 162.
- §95. Registration and priorities of mortgages, p. 166.
- §96. Executions and mechanics liens, p. 169.
- §97. Unregistered interests, notice and fraud, p. 173.
- §98. "Legal" and "equitable" mortgages, p. 182.
- §99. Remedies of the mortgagee, p. 185.

§91. *Registry Acts and Land Titles Acts.*

In the foregoing chapters the essential features of the contract of mortgage both at law and in equity have been considered, some account has been given of equitable mortgages, and the question of priorities in equity and under the Registry Act has been discussed. It is chiefly with regard to the question of priorities that the Registry Act affects the law of mortgage, by providing the means of recording deeds and other documents affecting the title to land and by enacting that with certain exceptions a registered document shall have priority over an unregistered document. Generally speaking the statute does not in other respects make any change in the nature or incidents of the contract of mortgage or in the legal or equitable principles governing the subject.

In addition, however, to the system of registration of deeds under the Registry Act, there is in Ontario under the Land

Titles Act (*a*) a system of registration of titles. Similarly in Manitoba there are two alternative systems under the Registry Act (*b*) and the Real Property Act (*c*) respectively, conveniently designated by statute as the "old system" and the "new system." In Saskatchewan (*d*), Alberta (*e*) and the Northwest Territories (*f*) there is but one system—that of registration of titles—under the Land Titles Act in force in each of these jurisdictions. In British Columbia there is under the Land Registry Act (*g*) a system of registration of titles with many special features. In the maritime provinces the old system of registration of deeds prevails (*h*).

The various statutes above mentioned which provide for the registration of titles have to such a degree qualified the application of the legal and equitable rules relating to mort-

(*a*) R.S.O. 1914, c. 126. This system was introduced in 1885. The statute is based on the English Land Transfer Act, 1875, with some modifications.

(*b*) R.S.M. 1913, c. 172. This statute is similar to the Ontario Registry Act.

(*c*) R.S.M. 1913, c. 171. The new system was introduced in 1885. The statute is based on the Victorian statute.

(*d*) Sask. statutes, 1917 (2nd sess.), c. 18.

(*e*) Alta. statutes of 1906, c. 24.

(*f*) R.S.C. 1906, c. 110. The system was introduced by the Territories Real Property Act, being 49 V. c. 26, in effect on the 1st of January, 1887. This statute was in 1894 replaced by the Land Titles Act, 1894, being 57 & 58 V. c. 28, in effect on the 1st of January, 1895. The Territories then included the present provinces of Saskatchewan and Alberta so that when these provinces were created in 1905 they had a system of registration of titles already in operation. The statutes in force in Saskatchewan, Alberta and the Northwest Territories are substantially similar to the Real Property Act of Manitoba but follow the Australian statutes more closely.

(*g*) R.S.B.C. 1911, c. 127. For an account of the history and operation of the system in British Columbia, see *Re Shotbolt*, 1888, 1 B.C.R. part 2, 337.

(*h*) In Nova Scotia a Land Titles Act was enacted in 1904, and in New Brunswick a Land Titles Act was enacted in 1914, but little has been done to bring these statutes into effective operation. They are based on the Ontario statute but are much slighter.

gages that it seems desirable to outline the main principles underlying the statutes, particularly with regard to their effect upon the distinction between the legal estate and equitable interests in land and upon the question of priorities between different mortgagees. These main principles are to a certain extent susceptible of being discussed without reference to the variations existing in the statutes of the different provinces. For the present purpose the systems of registration of titles may be treated as one system (*i*) and the statutes may be comprehensively referred to as the Land Titles Acts.

It is impossible, however, for anyone to read the statutes in question without being struck by the deplorable diversity of law in Canada on the subject of registration of titles. Apart from the many special features of the British Columbia statute and the fact that the Ontario statute is based upon an English original while the Manitoba, Saskatchewan, Alberta and Northwest Territories statutes are based on an Australian model, even the last mentioned group of statutes exhibit a diversity of arrangement and language which tends to obscure their common origin and their essentially similar character. Attention is drawn in the following pages to some of the more important differences between the statutes (*j*). Some observations

(*i*) This is specially true of the statutes in force in Manitoba, Saskatchewan, Alberta and the Northwest Territories, based on the Australian Torrens acts, and I am glad to acknowledge my indebtedness to the elaborate exposition of these Canadian statutes contained in Douglas J. Thom's *The Canadian Torrens System*. The work in question does not purport to discuss systematically the British Columbia Land Registry Act or the Ontario Land Titles Act, which are drawn on different lines from the other statutes above mentioned. For the sake of brevity in referring to the parallel provisions of the various statutes of Ontario and the western provinces I have adopted in this chapter a brief method of statutory citation by reference merely to the names of the provinces and the numbers of the sections, except in §§91 and 93, where the titles and chapter numbers of the statutes are mentioned.

(*j*) It has not proved practicable to discuss the British Columbia statute in detail.

made by J. E. Hogg (*k*), the learned commentator on the Australian Torrens statutes, are worthy of special mention. Expressed very briefly, his suggestions are (1) to abolish the double kind of title in British Columbia and Ontario, (2) to eliminate from the Ontario statute the special treatment of leases and the express recognition of unregistered transactions, (3) to provide a statutory form of mortgage and to separate the register of deeds from the register of titles in British Columbia, (4) to eliminate from the Manitoba statute (*l*) the provisions preventing the acquisition of title by possession, (5) to add to the Northwest Territories statute provisions for realizing on mortgages through the land titles office, (6) to repeal the Nova Scotia and New Brunswick statutes, and, the outstanding differences having thus been adjusted, (7) to draw a new uniform statute on the western rather than the Ontario model.

§92. Registration of deeds and registration of titles.

Under the Registry Act practically any instrument affecting land may be registered provided its execution is proved in the manner prescribed by the act. The registrar assumes no responsibility as to the legal effect of the instrument, which is simply recorded for whatever it is worth, so to speak, and a purchaser takes a conveyance at his own risk after having investigated the title disclosed by the various instruments which are registered or of which he has notice. Under the Land Titles Acts the owner of land is registered as such. Only the registered owner may register an instrument purporting to transfer or charge the land, and he must use one of the comparatively simple forms of instrument prescribed by the acts

(*k*) Article on Uniformity in Registration of Title Law in 37 C.L.T. 374-383 (May, 1917).

(*l*) Similar provisions are contained in the Ontario, Saskatchewan and British Columbia statutes (see chapter 26, *Limitation of Actions*, §282) and these statutes would have to be amended accordingly.

(m). The registrar is obliged to pass on the validity of the instrument, decide what its legal effect is, and if he admits it to registration, must enter on the register the change in the title to the land which results from the registration of the instrument. As a consequence of this procedure, when land is transferred the transferee becomes the registered owner and the earlier links in the chain of title become immaterial.

The main object of the land titles system "is to save persons dealing with registered proprietors from the trouble and expense of going behind the register in order to investigate the history of their author's title and to satisfy themselves of its validity. That end is accomplished by providing that every one who purchases, *bona fide* and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right notwithstanding the infirmity of his author's title" (n).

It is important to bear in mind the exact nature of the "main object" above mentioned. A purchaser in good faith is entitled to rely upon the register and need not go behind the title of the registered owner, but of course he must satisfy himself that an instrument purporting to be made by the registered owner is itself valid. Registration will not render an invalid instrument valid in favour of the purchaser therein named (o), but if the purchaser registers the

(m) Except in the case of the British Columbia statute.

(n) *Gibbs v. Messer*, [1891] A.C. 248, at p. 254. This is a leading case arising under the Transfer of Land Statute of Victoria. The question whether the same complete protection is intended to be afforded by the land titles system to a transferee who has not given valuable consideration is referred to in §97, *infra*, in connection with the question of the validity of unregistered interests.

(o) *Attorney-General v. Odell*, [1906] 2 Ch. 47, at pp. 75, 82. This was a case under the English Land Transfer Acts. Even under the statutes in force in the western provinces, although instruments become fully operative only upon registration (see §94), the result is not that registration necessarily validates an instrument between the parties or makes effective its whole contents. See, e.g., *Smith v. National Trust Co.*, 1912, 45 Can. S.C.R. 618, 1 D.L.R. 698, affirming 20 M.R. 522; cf. *Thom, The Canadian Torrens System*, 183 ff.

instrument and becomes the registered owner of an estate or interest, then, even though the instrument as regards him is invalid, a purchaser from him is protected by the statute, because this second purchaser is entitled to rely upon the register and need not go behind it, so that the instrument which is invalid so far as the immediate purchaser is concerned thus becomes a good root of title in favour of a subsequent purchaser.

The distinction just drawn may be best illustrated by the case of a forged transfer. The immediate transferee under a forged instrument has no title against the true registered owner and a certificate of title procured upon a forged transfer may be set aside (*p*). If, however, the transferee under the forged transfer, having become the registered owner, executes an instrument in favour of a purchaser or mortgagee in good faith and for value, such instrument being registered, is valid against the true owner (*q*).

§93. *Mortgages under the Land Titles Acts.*

The Manitoba Real Property Act (*r*) provides:

(*d*) The expression "mortgage" means and includes any charge on land created for securing a debt or loan or any hypothecation of such charge.

(*g*) The expression "encumbrance" means and includes any charge or lien on land other than a mortgage or any hypothecation of such charge or lien.

(*p*) *Gibbs v. Messer*, [1891] A.C. 248; *Re Adams and McFarland*, 1914, 20 D.L.R. 293. So if a forged transfer is made to a fictitious transferee and registered and then a forged mortgage is made in the fictitious name to the mortgagee in good faith and for value, the mortgagee gets no protection from the statute as against the true owner. *Gibbs v. Messer*, *supra*.

(*q*) *Gibbs v. Messer*, *supra*; *Assets Company v. Mere Roihi*, [1905] A.C. 177, at pp. 204, 211; *Brown v. Broughton*, 1915, 25 M.R. 489, 24 D.L.R. 244.

(*r*) R.S.M. 1913, c. 171, s. 2.

The Saskatchewan Land Titles Act, 1917 (*s*), provides:

5. "Mortgage" means a charge on land created for securing a debt or a loan, or an hypothecation of such charge.

7. "Encumbrance" means a charge on land created or effected for any purpose whatever, inclusive of mortgages, mechanics' liens and executions against lands.

The Alberta Land Titles Act (*t*) prov. s:

(*c*) The expression "mortgage" means any charge on land created merely for securing a debt or loan.

(*g*) The expression "encumbrance" means any charge on land created or affected for any purpose whatever, inclusive of mortgage, mechanics' lien, when authorized by statute or ordinance, and executions against lands, unless expressly distinguished.

The British Columbia Land Registry Act (*u*) provides.

"Charge" means and shall include any less estate than an absolute fee, or any equitable interest whatever in real estate, and shall include any encumbrance, Crown debt, judgment, mortgage, or claim to or upon any real estate.

In the Ontario Land Titles Act (*uu*) the term "charge" is used but is not defined.

(*s*) Statutes of 1917 (2nd sess.), c. 18, s. 2. For the sake of uniformity liberty has been taken with the text of some of the statutes to the extent of substituting "encumbrance" for "incumbrance." It is to be noted that the legislatures which enacted the Manitoba, Saskatchewan, Alberta and Northwest Territories statutes have not scrupled to tamper with the English language by enacting that "encumbrancer" means the owner of land subject to an encumbrance and by inventing a new word "encumbrancee" to express the person who in ordinary parlance is known as an encumbrancer. For the definition of "encumbrance" and "encumbrancer" in the Ontario Mortgages Act, see chapter 1, *Introductory*, §5.

(*t*) Statutes of 1906, c. 24, s. 2. The Land Titles Act in force in the Northwest Territories contains similar definitions: R.S.C. 1900, c. 110, s. 2. This dominion statute is hereinafter, for convenience, referred to as the Northwest Territories statute.

(*u*) R.S.B.C. 1911, c. 127, s. 2. "Absolute fee" is defined as meaning and comprising the legal ownership of an estate in fee simple. "An indefeasible fee" is defined as meaning an estate in fee simple held under a good safe-holding and marketable title.

(*uu*) R.S.O. 1914, c. 126.

Under the statutes above mentioned other than that of British Columbia simple forms of mortgages or charges are prescribed (17).

The form of charge prescribed by the rules made under the Ontario statutes is as follows:

I, A.B., the registered owner of the land entered in the office of land titles at — as parcel — in the register for — in consideration of (\$2,000) paid to me, charge such land with the payment to C.D., of etc., on the — day of — 19—, of the principal sum of (\$2,000) with interest at the rate of — per cent. per annum, and with a power of sale to be exercised after default and — month's subsequent notice of the intention to sell (or as the case may be) (add any covenants which are agreed to and are not implied under the Act or otherwise.)

I, E.B., wife of the said A.B., hereby bar my dower in the said land.

This charge is made in pursuance to *The Short Forms of Mortgages Act*, (where it is desired that the covenants, etc., should operate under that Act.) (18)

Dated — day of — 19 —

Witness,

(Signature of A.B. and E.B.)

N.Y.

(No seal necessary).

Note: If no interest is payable, or no power of sale given, substitute the words "without interest" or "without power of sale," as the case may be.

The Alberta form of mortgage (form N) is as follows:

I, A.B., being registered as owner of an estate (*here state nature of interest*), subject, however, to such encumbrances, liens and interests as are notified by memorandum underwritten (or endorsed hereon) of that piece of land (*description*), part of — section — township —, range —, (or as the case may be) containing —

(17) Man. s. 107; Sask. s. 98; Alta. s. 60; N.W.T. s. 91; Ont. s. 30. The forms do not contemplate execution under seal. B.C. s. 51, and Ont. s. 102, expressly provide that a transfer or charge may be duly made by instrument not under seal, the Ontario statute adding "and if so made the instrument and every agreement, stipulation and condition therein shall have the same effect for all purposes as if it were made under seal." If a mortgage under the other statutes is in fact executed under seal the debt is a specialty. *Toronto General Trusts Corporation v. The King*, 1917, 56 Can. S.C.R. 26. It is a common practice to insert many special covenants.

(18) See chapter 25, *Short Forms of Mortgages Act*, §381.

acres, be the same more or less (*here state rights of way, privileges, easements, if any, intended to be conveyed along with the land, and if the land dealt with contains all included in the original grants refer thereto for description of parcels and diagrams; otherwise set forth the boundaries and accompany the description by a diagram*), in consideration of the sum of — dollars lent me by E. F. (*here insert description*), the receipt of which sum I do hereby acknowledge covenant with the said E. F.

Firstly. That I will pay to him, the said E. F., the above sum of — dollars, on the — day of

Secondly. That I will pay interest on the said sum at the rate of — on the dollar, in the year, by equal payments on the — day of — and on the — day of — in every year.

Thirdly. (*Here set forth special covenants, if any*)

And for the better securing of the said E.F. the repayment in manner aforesaid of the principal sum and interest, I hereby mortgage to the said E.F. my estate and interest in the land above described.

In witness whereof, I have hereunto signed my name this day of — 19 —.

Signed by the above named

A. B. as mortgagor, in the

presence of

(*Signature of Mortgagor*).

(*Insert memorandum of mortgages and encumbrances*)

The Northwest Territories form of mortgage (form O) is practically identical with the Alberta form.

The Saskatchewan form of mortgage (form Q) begins

I, A.B. (*insert name, address and occupation of owner, as in certificate of title*), being registered as owner of an estate (*here state nature of interest*), in that piece of land described as follows: (*here insert description*) containing — acres, be the same more or less (*here state rights of way, privileges, easements, if any, intended to be mortgaged along with the land*), in consideration of the sum of — dollars

and continues as in the Alberta form, but omitting the note at the end as to the insertion of memorandum of mortgages and encumbrances.

The Manitoba form of memorandum of mortgage (schedule D) is as follows:

I, A.B., of —, being registered as owner of (*here state nature of estate or describe mortgage as case may require*), subject, however, to such encumbrances, liens and interests as are notified by

memorandum underwritten (or endorsed hereon), in that piece of land described as follows:—

in consideration of the sum of — dollars lent to me by E. F., of —, the receipt of which sum I do hereby acknowledge, covenant with the said E.F.:

First. That I will pay to him, the said E.F., the above sum of — dollars on the — day of —.

Second. That I will pay interest on the said sum at the rate of — on the dollar in the year by equal payments on the — day of —, and on the — day of —, in every year.

Third. (Here set forth special covenants, if any.)

And for the better securing to the said E.F. the repayment in the manner aforesaid of the principal money and interest, I hereby mortgage to the said E.F. my estate and interest in the land above described (or the said mortgage).

In witness whereof I have hereunto set my name this — day of —.

Signed by the above named

A.B. in the presence of

It will be observed that in the Ontario form of charge, the owner "charges" his land with the payment of the money, and in the forms of mortgages provided by the Manitoba, Saskatchewan, Alberta and Northwest Territories statutes the owner "mortgages" his estate and interest for the better securing the repayment of the money. In none of these forms are there any words of grant or conveyance, and it is expressly provided in each of the four last mentioned statutes that a mortgage or encumbrance shall have effect as security but shall not operate as a transfer of the land (*x*). The Ontario statute provides that a charge, when registered, shall confer upon the chargee a charge upon the interest of the chargor as appearing in the register (*y*). A charge or mortgage under the land titles system is therefore not a legal mortgage in the strict sense (*z*), but it is more accurately described as a registered

(*x*) Man. s. 108; Sask. s. 102; Alta. s. 61; N.W.T. s. 98.

(*y*) Ont. s. 20.

(*z*) See chapter 2, *Mortgage at Common Law*, §11.

or statutory mortgage (*a*). The registration of a mortgage is not intended to vest in the mortgagee any registered estate or interest or to effect any immediate dismemberment of the mortgagor's registered title, but merely renders the registered title subject to such powers of disposition as the statutes expressly or impliedly declare for the benefit of the mortgagee (*b*). The mortgagor's interest in the land is not an equitable one and cannot properly be described as an equity of redemption (*c*).

Inasmuch as under the land titles system a duly registered instrument has a special statutory operation and effect, the forms prescribed by the statute should be more strictly followed than is necessary in cases where instruments take effect according to the ordinary rules of conveyancing (*d*).

"An exact verbal compliance is not necessary, but the document must be in substance the same as the form prescribed. And it is not the same in substance when the divergence in form gives to one or more of the parties to it rights or remedies or imposes upon them duties or obligations which would not result from the use of the prescribed form" (*e*).

In Manitoba (*f*) a discretionary power is conferred upon the registrar-general to direct the registration under the new system of an instrument which is in accordance with the forms in use or sufficient to pass an estate or interest in land under the old system and which deals with land under the new system.

(*a*) See also §98.

(*b*) *Smith v. National Trust Co.*, 1912, 45 Can. S.C.R. 619, 1 D.L.R. 698; see quotation from Duff J's judgment, §99, *infra*.

(*c*) *Douglas v. Mutual Life Ass. Co.*, 1918, 13 A.L.R. 18, 38 D.L.R. 459, 29 D.L.R. 601, S.C., reversed by the Supreme Court of Canada, 8 Oct. 1918.

(*d*) *Thom, The Canadian Torrens System*, 106, 103 ff.

(*e*) *In re Rumely and Registrar* S.L.R.D., 1911, 4 S.L.R. 466, at pp. 473-4. Any departure from the statutory form is attended with some risk. *Capital and Counties Bank v. Rhodes*, [1903] 1 Ch. 631, at p. 638.

(*f*) *M. n. s.* 91.

§94. *The registered estate and its priority.*

Apart from statute the distinction between the legal estate in land and merely equitable interests is fundamental, and the question of priority as between different claims relating to land depends upon (1) the possession of the legal estate and (2) the order in which the claims are created, unless a person otherwise entitled to priority is estopped from asserting it (*q*).

Under the system of registration of deeds some inroad is made upon the importance of the distinction between the legal estate and equitable interests in that priority, as a general rule, depends not upon the order in which claims are created but upon that in which they are registered. In other respects, however, the legal effect of an instrument is not affected by the fact that it is or is not registered (*b*).

Under the land titles system in force in Manitoba, Saskatchewan, Alberta and the Northwest Territories (*c*) not merely does priority of registration prevail, as a general rule, but an instrument becomes fully effective only upon registration (*d*), so as to pass any estate or interest as against a transferee in good faith (*e*) or except as against the person executing the instrument (*f*). The old distinction between the legal estate and equitable interests therefore gives place to a new and fundamental distinction between the registered or statutory estate and unregistered or equitable interests.

The result of the registration of a title is to create in favour

(a) See chapter 7, *Equitable Principles governing Priorities*.

(b) See chapter 8, *The Registry Act*, §77.

(c) The statutory references given hereunder are to the statutes mentioned in §93.

(d) Man. s. 89; Sask. ss. 5, 6; Alta. ss. 23, 41; N.W.T. ss. 76, 77; B.C. ss. 104, 73. Cf. Thom, *The Canadian Torrens System*, pp. 89, 90.

(e) Man. s. 94; Alta. s. 46; N.W.T. s. 79.

(f) Sask. s. 58.

of the holder of a certificate of title a statutory estate, which may conveniently be called the "registered estate," which is analogous to the legal estate but is not necessarily identical with it (*m*) and does not necessarily involve the same consequences. "In short, the register of proprietors is not material for the purpose of ascertaining where the legal estate is. The transfer by registered disposition takes effect by virtue of an overriding power, and not by virtue of any estate in the registered proprietor" (*n*).

The certificate of title under the Manitoba statute reads:

A.B., of — is now seized of an estate (*state nature of estate*), subject to such encumbrances, liens and interests as are notified by memorandum underwritten (*i.e.* endorsed hereon), in that *piece* or parcel of land known or described as follows:

Under the Saskatchewan, Alberta and Northwest Territories statutes the certificate reads:

This is to certify that A.B., of — is now the owner of an estate (*describe the estate*), of and in (*describe the property*), subject to the encumbrances, liens and interests notified by memorandum underwritten or endorsed hereon, or which may hereafter be made in the register.

An ordinary registered title under these statutes resembles an "absolute" title under the Ontario statute (*o*) and an "indefeasible" title under the British Columbia statute (*p*). The Ontario statute also provides in the alternative for the registration of a "qualified" title or of a "possessory" title—the latter being merely the title of a person in possession as distinguished from that of a person having a title by possession.

(*m*) Land may be brought under the act and a registered estate created, although the land is subject to mortgage, so that the legal estate is outstanding in the mortgagee. Cf. *Thom, The Canadian Torrens System*, pp. 122, 123.

(*n*) *Capital and Counties Bank v. Rhodes*, [1903] 1 Ch. 631, at p. 655.

(*o*) Ont. ss. 9, 10, 43, 44.

(*p*) B.C. ss. 2, 22.

(q). The British Columbia statute also provides for the registration of an "absolute" title, that is, the title of a person *prima facie* entitled which may upon certain conditions be subsequently converted into an "indefeasible" title (r).

The expression "certificate of ownership" is used in the Ontario statute in a different sense from that in which the expression "certificate of title" is used in the Manitoba, Saskatchewan, Alberta, and Northwest Territories statutes. Under the latter group of statutes the "certificate of title" is bound in and forms part of the register. It is customary to deliver to the registered owner a "duplicate certificate of title," that is, an exact replica of the certificate in the register, and it is regarded as important that when an entry is made upon the certificate in the register a similar entry should be made upon the duplicate certificate (s). Under the Ontario statute, on the other hand, the only certificate of ownership is the document which is delivered to the registered owner if he requires it (t) and which is merely *prima facie* evidence of the matters therein contained (u). Some of the difficulty of comparing the provisions of the Ontario statute with those of the other statutes above mentioned disappears if it is remembered that either the "register" or the "certificate of title" under the latter statutes corresponds with the "register" and not with the "certificate of ownership" under the former statute.

As a general principle it may be stated that a transferee or mortgagee from the registered owner need not go behind the register and takes free from unregistered interests (v).

(q) Ont. ss. 11, 12, 13

(r) Cf. Thom, *The Canadian Torrens System*, pp. 24 ff., 66.

(s) Cf. Thom, *The Canadian Torrens System*, 58-60. See also §95, as to registration of mortgages.

(t) Ont. s. 38

(u) Ont. s. 91

(v) In addition to the statement of the qualifications of the general principle which follows in the text, see further the statutory

Under the Ontario statute a transfer of land by the registered owner is completed by the entry of the transferee on the register as owner (*w*), and it is provided as follows (*x*):

42. A transfer for valuable consideration (*y*) of land registered with an absolute title, when registered, shall confer on the transferee an estate in fee simple in the land transferred, together with all rights, privileges, and appurtenances belonging or appurtenant thereto, subject to:

- (a) The encumbrances, if any, entered or noted on the register.
- (b) Such liabilities, rights and interests, if any, as are declared for the purposes of the Act not to be encumbrances (*z*) unless the contrary is expressed on the register;

And as to such rights, privileges and appurtenances, subject also to any qualification, limitation or encumbrance to which the same are expressed to be subject in the register, or where such rights, privileges and appurtenances are not registered, then subject to any qualification, limitation or encumbrance to which the same are subject at the time of the transfer; but free from all other estates and interests whatsoever, including estates and interests of His Majesty, which are within the legislative jurisdiction of Ontario.

This section confers upon a transferee for value higher rights than are conferred upon the first registered owner by s. 10, by which it is provided that "where such first registered owner is not entitled for his own benefit to the land registered, then as between him and any persons claiming under him," he takes subject "to any unregistered estates, rights, interests, or equities to which such persons may be entitled." Under s. 42 a transferee for value without notice from the first registered owner takes free from the claim of

references contained in §95, *infra*. On the question to what extent registered and equitable interests may be valid, see § 97, *infra*. As to the main object of the land titles system, namely, to protect purchasers in good faith from the registered owner, see §92.

(*w*) Ont. s. 38.

(*x*) Ont. s. 42.

(*y*) As to the effect of absence of consideration, see §97, *infra*.

(*z*) *Inter alia*, taxes, easements, a lease for a period yet to run not exceeding three years where there is actual occupation under it, dower, curtesy and mechanics liens, as provided by s. 24.

a third party who seeks a declaration that the letters patent are void as having been issued through fraud or in error or improvidence (*a*).

Under the Manitoba, Saskatchewan, Alberta and Northwest Territories statutes, a certificate of title is conclusive evidence (*b*) that the person named therein is entitled to the land described therein for the estate or interest therein specified.

(1) Subject to the exceptions or reservations mentioned in the statute (*c*),

(2) Subject to the encumbrances, liens, estates or interests notified on the register (*d*),

(3) Free from all other encumbrances, liens, estates or interests whatsoever except in case of fraud wherein he has participated or colluded.

The difficult question of fraud as affecting the title of a registered owner is involved with that as to the effect of a person taking with notice of the claims of third parties, and will be mentioned later (*e*).

§95. *Registration and priority of mortgages.*

In the case of the registration of a transfer the result is the cancellation of the existing certificate of title and the

(*a*) *Farah v. Glen Lake Mining Co.*, 1908, 17 O.L.R. 1; cf. *Zock v. Clayton*, 1913, 28 O.L.R. 447, 13 D.L.R. 502.

(*b*) As of the date of the certificate or of the date of the last memorandum of a mortgage, whichever is the later date; cf. *Man. s. 75*. The sections as to the effect of a certificate of title are, *Man. s. 79*; *Sask. s. 59*; *Alta. s. 42*; *N.W.T. s. 72*.

(*c*) Including reservations or exceptions contained in the original grant from the crown, unpaid taxes, public highways, a lease or agreement for a lease, for a period not exceeding three years where there is actual occupation under the same, decrees, orders or executions filed and maintained in force against the owner. The exceptions or reservations are to some extent different under the various statutes: *Man. s. 78*; *Sask. s. 60*; *Alta. s. 43*; *N.W.T. s. 73*.

(*d*) As to the registration and priority of mortgages, see §95.

(*e*) See §97, *infra*.

issue in favour of the transferee of a new certificate which is itself the expression of the effect of the registration and affords a new starting point for the application of the Land Titles Act (*f*). In the case of the registration of a mortgage the evidence of the registration is merely the entry of a memorandum on the existing certificate of title, or, in other words, on the register (*g*). A mortgagee nevertheless obtains the benefit of the statute as effectively as if the certificate of title were cancelled and a new certificate were issued to him in respect of his charge subject only to prior registered mortgages and such other interests, exceptions or reservations as are valid against the holder of a certificate of title (*h*).

Under the Manitoba, Saskatchewan, Alberta and Northwest Territories statutes, when a mortgage is registered a memorandum of it must be made on the certificate in the register and, subject to certain statutory exceptions, on the duplicate certificate, and, unless production is dispensed with, the duplicate certificate must be produced in order that the mortgage may be noted upon it (*i*). So long as the land remains subject to a mortgage, the registrar retains the duplicate certificate on behalf of all persons interested in the land, and, if desired, he furnishes to the mortgagor a certificate of

(*f*) See §94 as to the effect of a certificate of title.

(*g*) As is pointed out in §94, the expression "certificate of title" in the Manitoba, Saskatchewan, Alberta, and Northwest Territories statutes means the folio in the register certifying to the owner's title, which a duplicate is delivered to the owner, whereas under the Ontario statute the "certificate of ownership" means the document delivered to the owner as distinguished from the register.

(*h*) Cf. *Thorn, The Canadian Torrens System*, 90, 91; *Gibbs v. Messer*, [1891] A.C. 248, at p. 254.

(*i*) *Man.* ss. 74, 89, 90; *Sask.* ss. 50, 54; *Alta.* ss. 20, 25, 60; *N.W.T.* ss. 41, 94. The references are to the statutes mentioned in §93.

charge (j). Under the Ontario statute a charge is completed by the entry on the register of the chargee as the owner of the charge, and the chargee is entitled to a certificate of charge, if he desires it, and if there is a certificate of ownership outstanding its production may be required in order that all proper entries or alterations may be made thereon (k).

Mortgages and other instruments in respect of or affecting the same estate or interest are entitled to priority according to the time of registration, and become fully effective only upon registration (l). As between two mortgages of the same land, that one for the registration of which the duplicate certificate is first produced is entitled to priority, irrespective of the dates of the instruments (m). Under the Ontario statute subject to any entry to the contrary on the register, registered charges on the same land as between themselves rank according to the order in which they are entered on the register, and not according to the order in which they are created (n).

Registration does not constitute notice to all the world. A mortgagee may make further advances as provided by his mortgage without being affected by the subsequent registration of another mortgage unless he has actual notice of it (o).

(j) Man. s. 127; Sask. s. 101; Alta. s. 71. Under N.W.T. s. 97, the mortgagor is entitled to possession of the duplicate certificate after the memorandum of mortgage has been endorsed upon it.

(k) Ont. ss. 30, 39, 40.

(l) See §94, and the statutes there cited.

(m) In re Greenshields, 1905, 6 N.W.T. L.R. 208; In re American Abell Engine and Thresher Co. and Noble, 1906, 6 N.W.T. L.R. 359.

(n) Ont. s. 36.

(o) Queensland Trustees v. Registrar of Titles, 1893, 5 Q.L.J. 46; Thom, The Canadian Torrens System, 193. As to the similar rule under the Ontario Registry Act, which expressly provides that registration of an instrument shall constitute notice of the instrument to all persons claiming any interest in the land subsequent to such registration, see chapter 8, *The Registry Act* §76. The priority of a mortgagee with regard to subsequent advances is specially pro-

§96. *Executions and mechanics liens.*

In Manitoba it is provided by the Judgments Act, R.S.M. 1913, c. 107, s. 3, that a certificate of a judgment for the payment of money may be recorded in all or any of the registry offices or land titles offices of the province,

and, from the time of the recording of the same, the said judgment shall, except as hereinafter mentioned, bind and form a lien and charge on all the lands of the judgment debtor in the several districts in the registry offices and land titles offices of which such certificate is recorded, the same as though charged in writing by the judgment debtor under his hand and seal (*p*).

In British Columbia it is provided by the Execution Act, R.S.B.C. 1911, c. 79, s. 27, that a registered judgment constitutes

a lien or charge on all lands of the judgment debtor . . . in the same manner as if charged by the judgment debtor under his hand and seal.

In Saskatchewan, Alberta and the Northwest Territories a writ of *fi ri facias* directed by the sheriff is used for the purpose of resorting to the judgment debtor's lands (*q*), and under the Land Titles Acts the sheriff, upon delivery of the writ to him, and payment of the prescribed fees, is required forthwith to deliver or transmit a copy to the registrar. The writ binds the debtor's lands only from the receipt of the copy by the registrar, and upon the subsequent granting of any certi-

vided for in Ontario by s. 74 of the Registry Act (quoted in §76) and this section applies also to a charge registered under the Ontario Land Titles Act; R.S.O. 1914, c. 126, s. 30.

(*p*) Cf. Manitoba Real Property Act, s. 70 (*d*).

(*q*) So in Ontario. In the case of land under the Registry Act the execution binds lands from the time of its delivery to the sheriff (The Execution Act, R.S.O. 1914, c. 80, s. 10), whereas in the case of land under the Land Titles Act (R.S.O. 1914, c. 126, s. 62) the land is not bound until receipt of a copy of the writ by the master of titles, and the sheriff is obliged to deliver or transmit a copy to the master of titles only upon the written request of the execution creditor or his solicitor.

ficate of title or the registration of any transfer, mortgage or other instrument executed by the execution debtor, the execution must be endorsed on the duplicate certificate of title (*r*).

It has been held in Alberta that an execution binds not only lands owned by the debtor at the time of the filing of the execution but also lands subsequently acquired by him while the execution is in force (*s*).

It has been held in Saskatchewan that an execution binds only registered interests of the debtor in land and does not affect an unregistered interest, as, for example, one held under a contract with the registered owner (*t*), but a different conclusion has been reached with regard to a certificate of judgment in Manitoba (*u*), and it is expressly provided in Alberta (*v*) that "upon and from the receipt by the registrar" of the copy of the writ of execution "all lands and interests in lands whether such interests be legal or equitable and any interest of an unpaid vendor of land shall be bound by such execution."

It has been held that the provisions of the Northwest Territories statute, from which those of the Saskatchewan and Alberta statutes are derived, do not displace the rule of law that an execution creditor can sell the real estate of his debtor only subject to the charges, liens and equities to which the same is subject in the hands of the debtor, and do not give the execution creditor any superiority of title over prior unregistered transferees but merely protect the land from subsequent sales

(*r*) Sask. ss. 149, 60; Alta. ss. 77, 43; N.W.T. ss. 124, 73.

(*s*) *Robin Hood Mills v. Harrison*, 1918, 40 D.L.R. 328 (Alta.).

(*t*) *Canadian Pacific Railway Co. v. Silver*, 1910, 3 S.L.R. 162; *Ranney v. Stirrett*, 1911, 4 S.L.R. 179; cf. *Thom, The Canadian Torrens System*, 261 ff.

(*u*) *Wallace v. Smart*, 1912, 22 M.R. 68, 1 D.L.R. 70 (equity of redemption under a mortgage in the form of an absolute conveyance).

(*v*) Alta. s. 77, as amended by 1917, c. 3, s. 40.

and dispositions by the execution debtor (*w*). A similar conclusion has been reached under the Manitoba and British Columbia statutes (*x*). The rule is the same in Ontario (*y*).

In the case, for instance, of an execution against a registered owner who has sold the land but who has retained the registered title for the purpose of securing payment of the purchase money, the execution creditor can sell only the execution debtor's beneficial interest. So far as that interest is concerned, however, the execution is a valid lien upon the land, and the purchaser is entitled, as between himself and the vendor, to have the lien removed before he pays the purchase money (*z*).

The Saskatchewan statute was amended (*a*) so as to provide that the writ of execution should bind and form a lien and charge on the lands of the execution debtor

as fully and effectually to all intents and purposes as though the said lands were charged in writing by the execution debtor under his hand and seal from and only from the time of the receipt of a certified copy of the said writ by the registrar for the registration district in which such land is situated.

This provision has, however, been omitted from the present statute, which provides that the execution shall be subject to such equities, charges or incumbrances as exist against the

(*w*) *Jellett v. Wilkie*, 1896, 26 Can. S.C.R. 282, affirming 2 N.W. T. L.R. 133. If the sheriff sells, however, the purchaser by priority of registration of the sheriff's deed would under the statute take priority over previous unregistered transfers.

(*x*) *Entwisle v. Lenz*, 1908, 14 B.C.R. 51; *Bain v. Pitfield*, 1916, 26 M.R. 89, 28 D.L.R. 206.

(*y*) See chapter 8, *The Registry Act*, §76.

(*z*) *Robinson v. Moffatt*, 1916, 37 O.L.R. 42, 25 D.L.R. 462. See, however, *Bank of Montreal v. Condon*, 1896, 11 M.R. 366, a decision which is adversely criticised by A. H. G. Murray in an article in 38 C.L.T. at pp. 460 ff. Cf. *Weidman v. McClary Mfg. Co.*, *infra*

(*a*) Sask. 1912-13, c. 16, s. 17, amending R.S.S. 1909, c. 41, s. 118, the predecessor of the present s. 149.

execution debtor in the land at the time of the receipt of the execution by the registrar (*b*).

Under the amendment above quoted it was held in Saskatchewan that an execution when received by the registrar has priority over an unregistered mortgage made by the judgment debtor (*c*), but in a later case it was held that an execution is subject to an unregistered transfer of the debtor's whole interest because the land is no longer his and therefore is not exigible (*d*). In a still later case a vendor agreed to sell lands but retained the registered title in them as security for the payment of the purchase money. It was held that the vendor had a beneficial interest which, coupled with the legal title, might be seized and sold under execution, but that the statutory charge of the execution creditor acquired pending the agreement for sale did not bind or form a lien on the purchase money, and that the purchaser who paid to the vendor the balance of the purchase money falling due after the filing of the execution without notice of the execution other than what, if any, might be presumed by reason of the filing of the execution, was entitled to an order for the removal of the execution (*e*).

Under the land titles system in Saskatchewan, Alberta and

(*b*) Sask. s. 149, in force on the 1st of May, 1918.

(*c*) *Union Bank of Canada v. Lumsden Milling Co.*, 1915, 8 S.L.R. 263, 23 D.L.R. 460.

(*d*) *Schlesser v. Colonial Investment Co.*, 1916, 9 S.L.R. 382. J. E. Hogg, in an article in 38 C.L.T. 31, at p. 35 (Jan. 1918), remarks that the distinction drawn between mortgage and transfer seems unsatisfactory, and that the case of *Union Bank of Canada v. Lumsden Milling Co.* and that of *Weidman v. McClary Mfg. Co.*, *infra*, are really inconsistent in their reasoning, since in the former *Jellet v. Wilkie*, *supra*, is held to be inapplicable by reason of the amendment, and in the latter is held to be applicable notwithstanding it.

(*e*) *Weidman v. McClary Mfg. Co.*, 1917, 10 S.L.R. 142, 33 D.L.R. 672. See, however, *Adanac Oil Co. v. Stocks*, 1916, 11 A.L.R. 214, 28 D.L.R. 215, and an article by J. E. Hogg in 38 C.L.T. 579 (September, 1918).

the Northwest Territories an unregistered mechanics lien, though valid against the owner during the period within which it may be registered, is like any other unregistered interest in that it is not good against a person who takes in good faith in reliance upon the register, but a prior mortgagee takes subject to the lien in so far as the lienholder can prove increased value (*f*).

In Manitoba, however, a certificate of title is by implication and without any special mention therein subject to any mechanics lien affecting the land (*g*).

In Ontario mechanics liens are valid against purchasers and mortgagees in the case of land under the Land Titles Act to the same extent as in the case of land under the Registry Act (*h*).

§97. *Unregistered interests, notice and fraud.*

It is provided in the Manitoba, Alberta and Northwest Territories that no instrument shall be effectual to pass any interest in land or to render the land liable as security for the payment of money "as against any *bona fide* transferee" of the land until (unless) the instrument is registered in accordance with the statute (*i*), the Northwest Territories statute adding "except a leasehold estate not exceeding three years" (*j*). The principle that an unregistered instrument

(*f*) Independent Lumber Co. v. Bocz, 1911, 4 S.L.R. 103.

(*g*) Man. s. 78.

(*h*) See chapter 8, *The Registry Act*, §79.

(*i*) Man. s. 91; Alta. s. 46. The references are to the statutes mentioned in §93. As to the general priority of the registered title, see §94.

(*j*) N.W.T. s. 70. Under Man. s. 78, Sask. s. 60, Alta. s. 43, and N.W.T. s. 73, a certificate of title is subject to any subsisting lease or agreement for a lease for a period not exceeding three years where there is actual occupation under the same.

is inoperative (except to pass a leasehold interest for three years or for a less period) is also expressed in Saskatchewan, and Alberta without the limitation "as against any *bona fide* transferee," but the Saskatchewan statute adds "except as against the person making the same" (*k*).

It is also provided that no memorandum or entry shall be made upon a certificate of title or upon the duplicate thereof of any notice of trusts whether expressed, implied or constructive; that the registrar shall treat any such notice as if there were no trust and the trustees therein named shall be deemed to be the absolute and beneficial owners of the land for the purposes of the statute (*l*).

It is further provided in Manitoba (*m*) as follows:

90. Except in the case of fraud on the part of such person, no person contracting or dealing with, or taking or proposing to take an instrument from, a registered owner shall be required or in any manner concerned to inquire into or ascertain the circumstances under, or the consideration for, which such owner or any previous owner is or was registered, or to see to the application of the purchase money or of any part thereof; nor shall any person be affected by notice, direct, implied or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any trust or unregistered interest is in existence shall not of itself be imputed as a fraud.

Similar provisions are contained in the Saskatchewan, Alberta and Northwest Territories statutes (*n*).

The exception in the case of fraud made in the provisions just mentioned is supplemented by the provisions regarding the effect of a certificate of title, namely that the certificate

(k) Sask. s. 58; Alta. s. 41.

(l) Sask. s. 62; Alta. s. 47; N.W.T. s. 75; cf. Ont. s. 95. The corresponding Manitoba provision (s. 100) contains some exceptions, notably in the case of an executor, administrator or trustee under a will, the will in such case being deemed to be embodied in and to form part of the certificate of title (s. 76). See chapter 13, *Persons entitled on Death of the Mortgagor*, §125.

(m) Man. s. 99.

(n) Sask. s. 194; Alta. s. 135; N.W.T. s. 167.

is conclusive evidence of the title of the person named therein, subject to certain exceptions, "free from all other encumbrances, liens, estates or interests whatsoever except in case of fraud wherein he has participated or colluded" (*o*).

The Ontario statute has no provision resembling s. 99 of the Manitoba statute, but it contains the following provision with regard to fraud (*p*):

121. Subject to the provisions of this Act, with respect to registered dispositions for valuable consideration (*pp*), any disposition of land or of a charge on land which, if unregistered, would be fraudulent and void shall, notwithstanding registration, be fraudulent and void in like manner.

Prima facie s. 99 of the Manitoba statute and the parallel provisions of the other statutes above mentioned are intended, except in the case of fraud, to exclude the application of the equitable doctrine that a person taking with notice, either actual or constructive, of an earlier equitable claim takes subject to it. Similar provisions are generally to be found in Torrens Title statutes and their meaning has frequently been the subject of judicial construction. They have indeed been the occasion of a struggle between legislatures and courts, the courts showing a marked tendency to attempt to escape from the letter of the statutes and to read into them the equitable doctrine as to the effect of actual notice.

The application of the doctrine of constructive notice is clearly excluded by the statutes (*q*), but, except as to mere constructive notice, J. E. Hogg submits that the legislative efforts to insist on the validity of registration in the face of

(*o*) Man. s. 79; Sask. s. 59; Alta. s. 42; N.W.T. s. 72. See §94, *supra*.

(*p*) Ont. s. 121.

(*pp*) As to the distinction drawn in the Ontario statute between a transferee for value and a voluntary transferee, see s. 45 of the statute quoted below.

(*q*) *Assets Co. v. Mere Roihi*, [1905] A.C. 176.

notice should be considered as having failed (c). In coming to this conclusion the learned commentator on the Australian Torrens system relies upon the decision of the Privy Council in the case of *Loke Yew v. Port Swettenham Rubber Co.* (d), which he thinks has the effect of overruling a number of earlier Australian cases.

It is not, however, altogether certain that it was decided by the Privy Council in the case mentioned that taking with actual notice necessarily constitutes fraud. W. Scott (e) submits that the question whether taking with actual notice amounts to fraud or not is always a question of fact and principle which involves the possible existence of cases in which actual notice would not involve fraud, "that however difficult it may be to draw the line between fraud importing grave moral blame" (f) and a disregard of notice not amounting to fraud, the distinction is a real one.

In cases where actual notice is brought home to the person whose title is impeached or to his agent (g) the courts will probably continue to find evidence of fraud wherever that is possible on the facts, and it is doubtful whether cases of actual notice not involving fraud in the view of courts of equity are likely to occur, but Scott's construction has the theoretical advantage that it avoids the complete reading out of the statutes the words regarding actual notice (h).

(c) Article in 29 L.Q.R. 434-441 (Oct. 1913).

(d) [1913] A.C. 491.

(e) *Torrens System Mortgages*, pp. 259-261. See also *Loam, Canadian Torrens System*, pp. 161 ff., 171 ff., for a discussion of the cases down to 1912.

(f) *Battison v. Hobson*, [1896] 2 Q.B. 40.

(g) *Assets Co. v. Mere Roihi*, [1905] A.C.

(h) The case of *In re Monolithic Building Co., Tacon v. The Company*, [1915] 1 Ch. 643, is worthy of special notice. The Court of Appeal held that s. 93 of the Companies (Consolidation) Act

The Canadian decisions do not clearly define the relation between actual notice and fraud. In some cases, in which the registered owner has been taken subject to unregistered claims, the decisions have been based on distinct evidence of fraud; in others there does not appear to have been evidence of fraud apart from the fact that the registered owner took with actual notice (a), and it would appear that a taking with notice is once a fact is regarded as equivalent to taking fraudulently.

Distancing the terms of section 106 from the provisions which seem to indicate a limited right to take subject to and other unregistered interests seems to be a logical step. The system is concerned with the taking of the land in the provisions of a process of registration. The validity of such interests, it seems to be settled, is a question of law and unregistered interests may be enforced by the courts (2) and it is as their enforcement is inconsistent with the main

purpose of the registered mortgage as against a subsequent registered mortgage. When the subsequent encumbrancer had actual notice of the first mortgage at the time when he took his mortgage, the law is clear.

See *Lyons v. Cochrane*, 46 Can. S.C.R. 573, 5 D.L.R. 661, affirming 4 S.L.R. 425; *Forbes v. Forbes*, 1914, 7 S.L.R. 443, 14 D.L.R.

Sydney v. Lyons, 1905, 36 Can. S.C.R. 140; *Lyons v. Cochrane*, 46 Can. S.C.R. 573, 5 D.L.R. 661; *Forbes v. Forbes*, 1914, 7 S.L.R. 443, 14 D.L.R. 443; *Shaw v. Bailey*, 1907, 17 M.R. 51, 11 D.L.R. 51. In *Shaw v. Bailey*, 1907, 17 M.R. 51, the notice was doubtful. In *Cooper v. Anderson*, 1912, 18, the notice was received after the making of the mortgage, and it was held that the notice was not binding. *See* *Grace v. Kuebler and Brunner*, 1917, 17 M.R. 59, at p. 48, affirming 11 A.L.R. 11. *See* *Phillips v. Phillips*, 1918, 42 D.L.R. 548.

(2) J. E. Hogg in an article in 29 L.Q.R. 434, at p. 436, (Oct. 1913), remarks that the efforts of the legislatures to insist that no interest shall pass otherwise than by registration have practically failed of success.

object of the land titles system, namely, to secure the indefeasibility of a title or interest obtained in good faith by transfer or other disposition on the part of the registered owner. As against the persons creating them equitable and unregistered interests are valid and enforceable because the recognition of such interests to this extent does not interfere with the main object of the land titles system (*a*). A registerable instrument under the Manitoba statute is, until registered, deemed to confer upon the person intended to take thereunder, or upon persons claiming under or through him, a right or claim to the registration of the instrument (*b*).

Thus, claims under unregistrable documents, for instance, a contract of sale, and those based upon instruments in statutory form but in fact unregistered, create alike equitable rights which may be enforced except as against transferees in good faith from the registered owner (*c*).

Substantially the same result appears to be reached under the Ontario statute, which expressly permits the creation of unregistered interests (*d*):

408 (1) No person other than the registered owner thereof shall be entitled to transfer or charge registered freehold or leasehold land by a registered disposition

(*a*) The analogy between unregistered interests (as contrasted with the registered estate) and equitable interests (as contrasted with the legal estate) is striking. An equitable interest is merely a right *in personam* as contrasted with the right *in rem* represented by the legal estate (see chapter 7, *Equitable Principles governing Priorities*, §67), and under the land titles system the same distinction is in effect made between unregistered interests and the registered estate

(*b*) Man. s. 98. Cf. Ont. s. 69

(*c*) *Jellett v. Wylie*, 1896, 26 Can. S.C.R. 282, affirming 2 N.W.T. L.R. 133 (as to this case, cf. §95, on the question of the priority of executions and mortgages *inter se*); *Tucker v. Armour*, 1906, 6 N.W.T. L.R. 388; *Shore v. Green*, 1890, 6 M.R. 322; *McEllister v. Biggs*, 1883, 8 App. Cas. 314; Thom, *The Canadian Torrens System*, 178-181, 126 ff.

(*d*) R.S.O. 1914, c. 175, ss. 68, 80

(2) Subject to the maintenance of the estate and right of such owner, any person having a sufficient estate or interest in the land may create estates, rights, interests and equities in the same manner as he might do if the land were not registered.

(3) Any person entitled to or interested in any unregistered estates, rights, interests or equities in registered land may protect the same from being impaired by any act of the registered owner by entering on the register such notices, cautions, inhibitions or other restrictions as are authorized by this Act.

(4) No person other than the registered owner thereof shall be entitled to transfer a registered charge by a registered disposition; but, subject to the maintenance of the right of such owner, unregistered interests in a registered charge may be created in the same manner and with the same incidents, so far as the difference of the subject matter admits, in and with which unregistered estates and interests may be created in registered land.

80. No person other than the parties thereto shall be deemed to have notice of the contents of any instruments other than those mentioned in the existing register of title of the parcel of land or which have been duly entered in the books of the office kept for the entry of instruments received or are in course of entry.

It is also provided by the Ontario statute (c) as follows:

45. A transfer of registered land, made without valuable consideration, shall be subject, so far as the transferee is concerned, to any unregistered estates, rights, interests or equities subject to which the transferor held the same; but otherwise, when registered, in all respects, and in particular as respects any registered dealings on the part of the transferee, shall have the same effect as a transfer of the same land for valuable consideration.

The section just quoted is a feature of the Ontario statute which distinguishes the land titles system in force in Ontario from that in force in Manitoba, Saskatchewan, Alberta and the Northwest Territories. Under the latter system it seems probable that a voluntary transferee from the registered owner is entitled to substantially the same protection as a transferee for value, provided the voluntary transferee takes in good faith, or, in other words, that as in the case of the transferee for value so in the case of the voluntary transferee, fraud alone will deprive the transferee of the protection of the statute.

(c) Ont. s. 45; *John Macdonald & Co. v. Tew*, 1914, 32 O.L.R. 262.

It is true that in some of the leading cases language is used which supports the view that the main object of the land titles system is to protect a transferee in good faith *and for value* from the registered owner (*f*), but such language may be due to the fact that usually the person who is entitled to claim the protection of the system as a transferee from the registered owner in good faith is also a transferee for value and that a voluntary transferee in good faith entitled to priority over persons claiming under earlier instruments is somewhat rare. The absence of valuable consideration is doubtless an element to which a court would attach some weight in considering whether a transfer is taken in good faith.

In fact, with slight exceptions (*g*), the statutes do not explicitly recognise any distinction between transferees for value and voluntary transferees.

In *Coventry v. Annable* (*h*) the plaintiff purchased land from the beneficial owner W. J. White, the title being vested in Kitty Ann White, and received a transfer from the latter. Subsequently Kitty Ann White conveyed the land to the defendant who registered his transfer and received a certificate of title. The trial judge held that the defendant was not guilty of fraud, but that the transfer to him was without consideration and therefore his title was no better than that of his transferor and that he held as trustee for the plaintiff. On appeal, however, the majority of the Supreme Court of

(*f*) Notably in the passage from *Gibbs v. Messer*, [1891] A.C. 238, quoted in §92, *supra*; cf. *Assets Co. v. Mere Rolih*, [1905] A.C. 176; *Brown v. Broughton*, 1915, 25 M.R. 489, at p. 501, 24 D.L.R. 244, at p. 252.

(*g*) E.g., the Manitoba statute (s. 84) permits an action for the recovery of land to be brought by a person deprived of land by fraud against a person deriving his right or title otherwise than *bona fide* for value from or through a person registered through fraud. Cf. *Sask.* s. 159; *Alta.* s. 104; *N.W.T.* s. 142.

(*h*) 1911, 4 S.L.R. 175, 425, affirmed *sub nom.* *Annable v. Coventry*, 1912, 46 Can. S.C.R. 373, 5 D.L.R. 661.

Saskatchewan found that the defendant's conduct was fraudulent and affirmed the judgment on this ground. An appeal to the Supreme Court of Canada was dismissed on the same ground, Idington J. and Anglin J. both taking care to say that they are not to be understood as dissenting from the view of the law expressed by the trial judge.

In *Coventry v. Annable* (i) Wetmore C.J. said:

"Having found as stated, the learned Judge held that Annable not being a purchaser for value was in no better position than Kitty Ann White, and that he held the land in trust for the plaintiff. He came to this conclusion under the authority of *Chonley v. Firebrace* (j) and *Crow v. Campbell* (k). In *Fish v. E yee* (l) *Johnstone J.* laid down the following: 'There is no distinction between a proprietor who has got on the register by fraud and one who has got there under a voluntary transfer, as against the rightful owner. In either case the registered owner may be declared a trustee for the rightful owner.' That case was decided under sec. 130 of the Territories Real Property Act, R.S.C. 1886, c. 51, which is as follows: 'Nothing contained in this Act shall take away or affect the jurisdiction of any competent court on the ground of actual fraud, or over contracts for the sale or other disposition of land, or over equitable interest therein.'

"If that section or one similar to it had been on the statute book when the transfer in question was made, I do not think that I would have much difficulty in agreeing with the conclusion which the trial Judge reached herein. But at the time that the transfer was executed the Land Titles Act, 1894, was in force, and the corresponding section to sec. 130 of the Territories Real Property Act was very materially different. The words 'or over equitable interest therein' had been eliminated, and the words 'for which a certificate of title had been granted' substituted (see sec. 130 of the Land Titles Act), and that section was carried forward and forms sec. 4 of the Land Titles Act, 1906 (Sask.). In *Turner v. Clark* (m) I held that if there was collusion or fraud or the conveyance to the transferee was without consideration, the Court had jurisdiction to deal with the matter, notwithstanding the fact that a certificate of title had issued to such transferee, and I held this under the Saskatchewan

(i) 1914, 1 S.L.R. 425, at pp. 431, 432.

(j) 1875, 1 V.L.R. 57, 1 Hunter's Torrens Title Cases 98.

(k) 1884, 1 V.L.R. 186, 1 Hunter's Torrens Title Cases 87.

(l) 1909, 2 S.L.R. 111, at p. 118.

(m) 1909, 2 S.L.R. 200, at p. 204.

Act. In view of the decision of the Judicial Committee of the Privy Council in *Assets Co. v. Mere Roihi* (n) I am by no means sure that what I so laid down stands on as solid grounds as what is above stated to have been laid down by my brother Johnstone in *Fish v. Bryce*. I express no opinion as to the effect this judgment of the Judicial Committee may have had in this case from the standpoint only that no consideration was given for the transfer, as I have put my judgment on another ground."

§98. "Legal" and "equitable" mortgages.

Although the term "legal mortgage" is inappropriate to a mortgage under the land titles system (o) and is not in fact in common use, the term "equitable mortgage," which under the old system is used in contradistinction to a legal mortgage, is under the new system commonly used to indicate a mortgage or charge other than a registered or statutory mortgage. Under the old system any mortgage subsequent to a legal mortgage is necessarily an equitable mortgage (p), but under the new system a second mortgage is of the same nature as a first mortgage (q). In other respects, however, the ordinary rules as to equitable mortgages prevail under the land titles system (r). Thus, an equitable mortgage may be created by an agreement to execute a mortgage or to charge money on land or by deposit of documents of title (s).

Under the English Land Transfer Acts of 1875 and 1897, upon the former of which the Ontario statute was based, it

(n) [1905] A.C. 176

(o) A legal mortgage, strictly speaking, means a mortgage by which the legal estate is transferred (see chapter 2, *Mortgage at Common Law*, §11), whereas a mortgage under the land titles system operates by way of security merely (see §93, *supra*).

(p) See chapter 5, *Equitable Mortgages*, §41.

(q) Except perhaps in Manitoba, where by the Real Property Act, s. 116, a first mortgagee has the same rights and remedies as if the legal estate were vested in him subject to the usual redemise clause giving the mortgagor the right to possession until default. See §99, *infra*.

(r) Thom, *Canadian Torrens System*, pp. 274 ff.

(s) See chapter 5, §§44, 45.

has been held that the legal estate is not necessarily in the registered owner or mortgagee. As between unregistered charges the possession of the legal estate may confer priority, subject to the overriding power of the statute in favour of a registered disposition, and they take effect between themselves in the same manner as if the land was not registered (*l*).

A caveat may be filed in Manitoba by "any person claiming an estate or interest in land, mortgage or incumbrance under the new system," in Alberta by "any person claiming to be interested . . . in any land, mortgage or incumbrance," in Saskatchewan and the Northwest Territories by "any person claiming to be interested in land" (*u*). The effect of the filing of a caveat is that so long as it remains in force the registrar is prohibited from registering any instrument affecting the land, mortgage or incumbrance "unless such instrument is expressed to be subject to the claim of the caveator" (Manitoba, Alberta) or "except subject to the claim of the caveator" (Saskatchewan, Northwest Territories) (*v*).

In Saskatchewan and the Northwest Territories, it will be observed, the statutes do not expressly authorize the filing of a caveat claiming an interest in mortgages and incumbrances but in view of the wide definition of "land" contained in each of the statutes it is difficult to see why such a caveat should not be filed (*w*).

In Manitoba there is a special provision (*x*) as follows:

The filing of a caveat by the district registrar, or by any caveator, shall give the same effect, as to priority, to the instrument or

(*l*) *Capital and Counties Bank v. Rhodes*, [1903] 1 Ch. 631.

(*u*) Man. s. 138; Alta. s. 84; Sask. s. 128; N.W.T. s. 131. In Ontario (s. 72) a caution may be lodged by "any person interested in any way in any land or charge registered in the name of any other person." See *Re Clagstone and Hammond*, 1897, 28 O.R. 409.

(*v*) Man. s. 140; Alta. s. 87; Sask. s. 134; N.W.T. s. 134; cf. Ont. s. 73.

(*w*) *Scott, Torrens System Mortgages*, p. 285.

(*x*) Man. s. 151.

subject matter on which said caveat is based, as the registration of any instrument under this act; and the district registrar may, in his discretion, allow the withdrawal of such caveat at any time, and the registration, in lieu thereof, of the instrument under which the person on whose behalf such caveat was filed claims his title or interest; and, if the withdrawal of such caveat and the registration of such instrument be simultaneous, the same priority shall be preserved to all rights under the instrument as the same rights were entitled to under the caveat.

In Alberta (*y*) there is a provision substantially in the same terms except that after the words "claims his title or interest" there follow the words "provided that such instrument is an instrument that may be registered under this Act" (*z*).

It has been held under the Saskatchewan statute that the lodging of a caveat in the land titles office prevents the acquisition of any legal or equitable interest in the lands in question adverse to or in derogation of the claim of the caveator. A company being the registered owner of land, made a written agreement to sell it to P., who assigned his interest in the contract to G., who then agreed to transfer the equitable interest thus acquired to the plaintiff. Subsequently, without knowledge of the plaintiff's interest, the defendants acquired a like interest from G. A caveat was then lodged by the plaintiff, and subsequently, without enquiry and without actual notice of the caveat, the defendants received an assignment of the original agreement of sale to P. and obtained the company's approval of it. In an action for specific performance it was held that as the purchasers from G. were on equal terms as to equities except that the plaintiff had priority in point of time when his caveat was lodged, his priority was preserved by the lodging of the caveat, and that the subsequent advantage which would otherwise have been

(*y*) Alta. s. 97.

(*z*) A similar proviso was formerly contained in the Manitoba statute.

secured by the defendants by virtue of the company's approval was postponed to any equitable right which the plaintiff might have to a transfer (a).

It has also been held in Saskatchewan that a transferee for value without notice of an earlier equitable charge takes subject to the charge if a caveat is lodged in respect of it after the payment of the purchase money and the execution of the transfer but before registration of the transfer (b).

Under the Alberta statute that one of two equitable interests in respect of which a caveat is first filed has priority over the other notwithstanding that the latter is prior in time. Therefore, where a duplicate certificate of title has been deposited with one person by way of equitable mortgage and subsequently a registerable mortgage is made in favour of another person, who is unable, however, to register the mortgage because the duplicate certificate is not in the land titles office, the filing of a caveat by the holder of the registerable mortgage will give him priority over the equitable mortgagee (c).

§99. *The remedies of the mortgagee.*

In *Smith v. National Trust Co.*, Duff J. (d), referring to the Manitoba Real Property Act, says:

"The Act does not.....treat the mortgage authorized by it as an instrument immediately effecting any dismemberment of the mortgagor's registered title. The operation of the statute is rather this: when a registered owner wishes to charge his registered title

(a) *McKillop & Benjafield v. Alexander*, 1912, 45 Can. S.C.R. 551, 1 D.L.R. 586, affirming *Alexander v. Gesman*, 4 S.L.R. 111

(b) *Coast Lumber Co. v. McLeod*, 1914, 7 S.L.R. 382, 20 D.L.R. 313

(c) *Muller v. Schwalbe, Re Royal Bank and Banque d'Hoche-laga*, 1914, 8 A.L.R. 125, 19 D.L.R. 19, where there is a discussion of the cases of *Stephen v. Bannan and Gray*, 1913, 6 A.L.R. 418, 14 D.L.R. 333, and *McKillop & Benjafield v. Alexander*, *supra*

(d) Delivering the judgment of the majority of the court, 1912, 45 Can. S.C.R. 618, at pp. 640, 641, 1 D.L.R. 698, at pp. 712, 713. As to the question of the validity of the contractual power of the sale decided in this case, see chapter 31, *Sale under Power of Sale*, §345.

as security for a debt, he is to execute an instrument by which he declares that he 'mortgages' his land and that instrument being registered the mortgagee becomes invested with such rights in respect of the possession of the land and its profits and the registered title becomes (for the benefit of the mortgagee) subject to such powers of disposition as the statute expressly or by implication declares. It is in these rights and powers that the virtue of the mortgage as a real security consists; and it is, consequently, to the statute that we must primarily resort to ascertain what are the rights and powers incidental to such a security.

"It is argued that the view thus stated is too narrow, and another view is put forward, which is this: that the mortgage authorized by the Act is to be regarded as having annexed to it all the legal incidents which by law belong to a mortgage at common law and as being capable of having annexed to it by contract all the incidents which may by contract be annexed to a mortgage at common law in so far as such incidents are not expressly or by necessary implication excluded. I think in either view the practical result of this appeal must be the same; but I must say that it seems to me to be an artificial and unnatural reading of the statute to regard the mortgage contemplated by it as primarily a common law mortgage, and I think that in adopting such a reading one incurs some risk of losing the point of view from which the legislator envisaged the problem to which he was addressing himself. There is much in the Act to indicate an intention on the part of its authors that under the statutory mortgage the powers and rights of the mortgagee should in substance be economically equivalent to those possessed by a mortgagee under a common law mortgage; yet, juridically considered, there is as I have indicated this essential difference between the two instruments, viz.: that at common law the rights and powers of the mortgagee as such in respect of the mortgaged property are rights and powers which are incidental to the legal or equitable estate vested in him as mortgagee while under the statutory instrument the rights and powers of the mortgagee do not and cannot take their efficacy from any such estate because none is vested in him and his rights and powers must consequently rest directly upon the provisions of the statute itself.

"This view, of course, does not involve the consequence that the mortgagee's rights are those only which the statute expressly gives him. It is obvious that many things are left to implication; and where, in any particular case, it appears that the rules governing reciprocal rights of the mortgagor and mortgagee under the mortgage contract in relation to the mortgaged property are left to implication then it is a question to be determined upon an examination of the statute as a whole how far the rights of the parties are to be governed by the rules of law which, apart from the statute, are applicable between mortgagor and mortgagee."

The remedies of a mortgagee under the land titles system will be mentioned in their appropriate places in subsequent chapters, and only some observations of a general nature need be made here.

Apart from statute a mortgagee's remedies may be classified (c) as follows:

(1) Remedies available to the mortgagee without recourse to the courts by reason of his having the legal estate in the mortgaged land, for instance, the right, subject to a redeem clause, to take possession of the mortgaged land, or, if the land is in the occupation of a tenant under a paramount title, to compel payment of the rent by the tenant.

(2) Remedies available to the mortgagee by recourse to the court, chiefly under the equitable jurisdiction of the court, for instance, the right to foreclosure or sale, or the right to obtain the appointment by the court of a receiver.

(3) Remedies available to the mortgagee by reason of special covenants or contractual stipulations contained in the mortgage, for instance, the right to sue on the covenant for payment, to sell under power of sale, to distrain or to appoint a receiver.

Remedies of any of the three classes above mentioned may be available to a mortgagee under the land titles system if the Land Titles Act in question has expressly or impliedly made them available to a mortgagee. The following special questions may arise as to the several classes of remedies.

(1) With regard to the first class it may be generally stated that a mortgagee under the land titles system does not possess the legal estate and therefore is not entitled to the remedies incident to that estate, unless the statute expressly or impliedly gives them to him (f).

(c) See Thom, *op. cit.*, pp. 288 ff. for a classification of the mortgagee's remedies on a somewhat different principle and for a discussion of those remedies under the land titles system.

(f) *Smith v. National Trust Co.*, *supra*.

(2) With regard to a remedy of the second class it may have to be considered whether such remedy has been superseded by a similar remedy which is the subject of special provision in the statute or whether in the absence of special provision the jurisdiction of the court to give such remedy exists under the statute or is consistent with its terms.

(3) With regard to remedies of the third class it has to be considered whether a right stipulated for by the mortgagee is deemed to be excluded by reason of the existence of special statutory remedies or to what extent, if at all, the privilege of stipulating for special rights is consistent with the statute or the forms of mortgage prescribed for use under it.

"Special covenants" may be inserted in a mortgage (*g*) provided they do not conflict with the nature of the instrument or the terms of the statute, and it is customary in a well-drawn mortgage to insert a number of such special provisions (*h*). In Saskatchewan, Alberta and the Northwest Territories short forms of covenants are provided which if used are to be taken to have the same effect as the corresponding extended forms of covenants set out in the forms appended to the statutes subject to such express exceptions or qualifications as may be introduced into or annexed to the short forms (*i*). The short forms of covenants are that the mortgagor (1) Has a good title to the said land, that he (2) Has the right to mortgage the land, (3) And that on default the mort-

(*g*) Man. Schedule D; Sask. form Q; Alta. form N; N.W.T. form O. The references are to the statutes mentioned in §93, where these forms are also set out.

(*h*) Cf. Thom. *op. cit.*, pp. 285, 286. A conventional power of sale is not a "special covenant" which is permitted. See chapter 31, *Sub. under Power of Sale*, §345.

(*i*) Sask. s. 105; Alta. s. 70; N.W.T. s. 109. In Ontario, by s. 31 (2), certain of the short forms of covenant provided by the Short Forms of Mortgages Act may be used in a charge which is expressed to be made in pursuance of the statute. See chapter 35, §381.

gagee shall have quiet possession of the land, (4) Free from all incumbrances, that the mortgagor (5) Will execute such further assurances of the land as may be requisite, and that he (6) Has done no act to incumber the land (j).

Although a mortgage under the new system is more akin to an equitable mortgage than to a legal mortgage under the old system (k), the law governing the relations of mortgage and mortgagor in connection with a legal mortgage is frequently applied to a mortgage under the new system. Whenever either by the express terms of the statute, or by implication, or by any covenant which is permitted by the statute to be inserted in a statutory mortgage, a right arises either the same as or similar to a right existing or which might arise under a legal mortgage, the old law of mortgages is drawn upon for the details in connection with the working out of that right (l).

In Saskatchewan, Alberta and the Northwest Territories the language of the statutes would seem to indicate that a mortgagee must resort to the courts in order to enforce any of his rights under the mortgage (m), or in the alternative, in the case of Saskatchewan and Alberta, take proceedings in the land titles office, but it is said to be common practice in Saskatchewan and Alberta for the mortgagee to distrain under a license to distrain or under an attornment clause, to take possession and even to make leases (n).

In Manitoba the statute provides as follows (o):

116. In addition to and concurrently with the rights and powers conferred on a first mortgagee, every present and future first

(j) Alta. form S; N.W.T. form U; Sask. form T.

(k) See §§93, 98, *supra*.

(l) See Thom, *The Canadian Torrens System*, pp. 282 ff.

(m) See Sask. ss. 107 ff; Alta. ss. 62 and 62a; N.W.T. s. 99, referred to in chapter 24, *Action for Foreclosure or Sale*, §246.

(n) Thom, *op. cit.*, pp. 294-296.

(o) Man s. 116. The meaning of the section has been considered in *Commercial Bank v. Breen*, 1889, 15 V.L.R. 572; 1 Hunter's

mortgagee for the time being of land under this Act shall, until a discharge from the whole of the money secured or until a transfer upon a sale or order for foreclosure (as the case may be) shall have been registered, have the same rights and remedies at law and in equity (c) as he would have had or been entitled to if the legal estate in the land or term mortgaged had been actually vested in him with a right in the owner of the land of quiet enjoyment of the mortgaged land until default in the payment of the principal and interest money secured or some part thereof respectively, or until a breach in the performance or observance of some covenant expressed in the mortgage or to be implied therein by the provisions of this Act. Nothing contained in this section shall affect or prejudice the rights or liabilities of any such mortgagee after an order for foreclosure shall have been entered in the register or shall, until the entry of such order, render a first mortgagee of land leased under this Act liable to or for payment of the rent reserved by the lease or for the performance or observance of the covenants expressed or to be implied therein.

Torrens Title Cases 407; *Farrington v. Smith* 1894, 20 V.L.R. 90; *Williams v. Box*, 1910, 19 M.R. 560, at p. 588, 44 Can. S.C.R. 1; *Smith v. National Trust Co.*, 1912, 45 Can. S.C.R. 618, 1 D.L.R. 698; *Thom, op. cit.*, pp. 299 ff.

(p) The section was first enacted in 1900. In 1906 the following words were added after the word "equity": "including the right to sell or foreclose through any competent court." In 1911 the words added in 1906 were struck out.

PART III. **PERSONS CLAIMING UNDER THE** **MORTGAGEE.**

CHAPTER XI.

ASSIGNEE OF THE MORTGAGE.

- §101. Transfer of mortgage may include both debt and land, p. 191.
- §102. Assignment of mortgage debt, p. 194.
- §103. Notice to, or concurrence of, the mortgagor, p. 196.
- §104. Assignment subject to state of account, p. 198.
- §105. Assignment subject to equity or set-off, p. 201.
- §106. Equity to reform or avoid mortgage, p. 205.
- §107. Liability of assignor to assignee, p. 206.
- §108. Rights and powers of assignee, p. 208.

101. Transfer of mortgage may include both debt and land

A mortgagee has the right to transfer or assign it either absolutely or by way of sub-mortgage (*a*). In certain circumstances he may be obliged to transfer the mortgage instead of conveying or executing a discharge (*b*).

The mortgage transaction includes usually both a debt and a conveyance of land as security, and a complete transfer of the mortgage includes an assignment of the debt and a conveyance of the land, but either may be assigned or conveyed separately (*c*). An assignment of the debt, with a reservation of the security to the assignor, leaves the assignor as the per-

(a) *In re Tabiti Cotton Co., Ex parte Sargent*, 1874, L.R. 17 Eq. 273, at p. 279; *Taylor v. Russell*, [1892] A.C. 244, at p. 255.

(b) See chapter 20, *Right to Assignment of Mortgage*.

(c) Cf. 21 Halsbury, *Laws of England*, p. 171.

son who is the proper party in foreclosure or redemption, though he is a trustee of any money thereby obtained for the assignee of the debt (*d*). A transfer of the security without an assignment of the debt carries the benefit of the debt so far as it is charged on the property, since the mortgagor cannot redeem without paying the debt to the transferee, but the transferee cannot sue on the covenant (*c*).

A transfer of a mortgage is usually made by deed, and this is essential in order to pass the legal estate in real or leasehold property; but, as regards the mortgage debt, an assignment under hand only is effectual, notwithstanding that the debt was created by deed (*f*); and an assignment under hand is effectual to pass any equitable interest in property which is vested in the mortgagee (*g*). An assignment of a mortgage by deposit of title deeds should be in writing, but in effect such mortgage may be assigned by the delivery of the deeds by the mortgagee to the assignee who has paid him off (*h*).

Where the holder of a mortgage, while suffering from an illness of which he subsequently died, endorsed on the indenture a memorandum assigning the same to his wife for the benefit of herself and his children, which he signed but did not seal, although the memorandum expressed it to be under seal, it was held that the wife took no interest under such assignment, either as a gift *inter vivos* or as a *donatio mortis causa*; and a bill filed by her to compel the executors to exe-

(*d*) *Morley v. Morley*, 1858, 25 Beav. 253, at p. 258, cf. *In re Patrick, Bills v. Tatham*, [1891] 1 Ch. 82.

(*c*) *Jones v. Gibbons*, 1804, 9 Ves. 407, at p. 411.

(*f*) R.S.O. 1911, c. 109, s. 49. See §102.

(*g*) 10 Halsbury, Laws of England, pp. 375, 376.

(*h*) 21 Halsbury, Laws of England, p. 174, *Brocklesby v. Temperance Building Society* [1895] A.C. 17, at pp. 182, 183; *Dryden v. Fildes*, 1878, 3 M. & Cr. 670, at p. 673.

cute a formal assignment of the mortgage was dismissed with costs (i).

Where a mortgagee by endorsement on the mortgage deed assigned to M. "his executors, administrators and assigns, all his right, title and interest in and to the within mortgage," this was held insufficient to pass the land mortgaged (j), and where an assignment under seal, annexed to a mortgage, stated that the assignor "bargained, sold, assigned and transferred" unto the assignee, "his heirs and assigns, the annexed mortgage, and all the right, title and interest therein" of the assignor, "to have and to hold the same unto the said etc., his heirs and assigns, to his and their sole use forever," it was held that the land mortgaged did not pass by these words (k).

An assignment by an administratrix of a mortgage, being part of the assets of the intestate, was held valid, though not therein stated to be executed by her as administratrix (l).

Where the mortgagee "assigned, transferred, conveyed and set over, ... the said indenture of mortgage, and all his right, title and interest therein, and in the premises therein mentioned," it was held that the mortgagee's interest in the land passed (m). A "grant" of the lands would, of course, be sufficient for the purpose (n). Where the granting part of a deed of assignment transferred the indenture simply, and the *habendum* mentioned in addition the interest of the mortgagee in "the lands therein described," it was held that the estate passed (o).

It was held that a grant of "all lands situate in the Prov.

(i) *Tiffany v. Clarke*, 1858, 6 Gr. 474.

(j) *Moran v. Currie*, 1857, 8 U.C.C.P. 60.

(k) *Anston v. Boulton*, 1866, 16 U.C.C.P. 318.

(l) *Yarrington v. Lyon*, 1866, 12 Gr. 308.

(m) *Wat v. Fender*, 1862, 12 U.C.C.P. 210.

(n) See chapter 1, *Introductory*, §5.

(o) *Doe dem. Wood v. Fox*, 1810, 3 U.C.R. 134.

inee of New Brunswick of which the grantor was seized in fee" was insufficient to pass lands to which the grantor was entitled as mortgagee (*p*).

Under the land titles system a mortgage does not convey the legal estate but operates by way of security only (*q*). A transfer of mortgage must in point of form comply with the Land Titles Act in force in the province where the land is situated and the effect of the transfer is governed by the statute (*r*).

The English Conveyancing Act, 1881, provides a form of transfer of a statutory mortgage, the operative words of the transfer being that the transferor conveys and transfers "the benefit of" a "said mortgage." It has been held that a transfer in this form of a mortgage not in the statutory form and to which the statute does not apply does not operate to transfer the legal title in the mortgaged property (*s*).

§102. Assignment of mortgage debt.

A mortgagee may of course transfer his interest in the land without the concurrence of or notice to the mortgagor, and the mortgage debt necessarily passes as incident to the security (*t*), but in order that the transferee may be entitled to sue upon the covenant there must be an assignment of the mort-

q See *Docton v. Holderness*, 1846, 3 Kerr (N.B.) 238.

r See Chapter 10, *The Land Titles Act*, 1900.

s R.S.O. 1914, c. 126, s. 54; R.S.M. 1913, c. 171, s. 106, 1.

t Sask. statutes, 1917 (2nd sess.), c. 18, s. 1; *Wright v. Wright*, 1916, c. 24, s. 6688; R.S.B.C. 1901, c. 1, s. 10; R.S. 1906, c. 10, s. 10; R.S.N.S. 1906, c. 1, s. 10; R.S. 1906, c. 1, s. 10; R.S. 1906, c. 1, s. 10.

u See *Beachey v. Beaton*, 1901, 1 Ch. 67.

v From sense already indicated, *Wright v. Wright*, 1917, 59 O.L.R. 101.

w *Wright v. Wright*, 1917, 59 O.L.R. 101; *Wright v. Wright*, 1917, 59 O.L.R. 101.

gage debt (*n*) and a transfer of a mortgage usually contains such an assignment. The debt like other choses in action was formerly not assignable at law. It was assignable in equity but the assignee was obliged at law to sue in the name of the assignor, and therefore it was usual to insert in the transfer of a mortgage a power of attorney to use the assignor's name (*r*).

It is now provided in Ontario by the *Conveyancing and Law of Property Act*, R.S.O. 1914, c. 109, s. 49, as follows (*n*):

49 (1) Any absolute assignment, made on or after the 31st day of December, 1897, by writing under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action of which express notice in writing shall have been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee if this section had not been enacted, to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor.

An assignment which does not purport to be by way of charge only but which purports to transfer the whole interest of the assignor to the assignee is an absolute assignment with in the meaning of the statute even though it appears on the face of the assignment that it is subject to a right of redemp-

tion. Under the land title system the simple transfer of the mortgage in the form prescribed by statute has, when registered, the effect of vesting in the transferee the right to sue for the debt. See statutory references in §101.

Relief would be given in equity to the assignee if the assignor had been indemnified against all costs and charges, refused to give a discharge, and refused to use his name. *1 W. & T. L.C. Ed. 116*.

Before 1897 R.S.O. 1897, c. 51 (The Judicature Act) gave effect to the assignment of choses in action. Before 1897 the assignment of choses in action was governed by R.S.O. 1887, c. 122, ss. 6 and 7, but in that year by the Judicature Act, R.S.O. 1897, c. 51, s. 10. See also the English Judicature Act, 1873, s. 25, and the Ontario Judicature Act, 1897, s. 10.

tion or that it is made only for the purpose of securing a debt smaller in amount than the mortgage debt (*x*).

Where a third party arranged with the mortgagor to take a new mortgage, and made one payment to the mortgagee of the amount of the then arrears, and at the maturity of the mortgage paid the balance owing and took an assignment in which the amount paid at maturity was recited as the debt then owing and assigned, it was held, in accordance with the intention of the parties to the assignment that the assignee was entitled to hold the mortgage as security for both payments made by him (*y*).

102. *Notice to, or concurrence of, the mortgagor*

It will be observed that an assignment of a chose in action under the statute is not effective until express notice in writing is given to the debtor (*z*). Notice to the debtor is not, however, essential to the validity of an equitable assignment as between the assignor and the assignee (*a*), and an assignment which does not comply with the statute may nevertheless be a good equitable assignment (*b*). Formerly the rule was that an equitable assignee must sue in the name of the assignor. But in modern practice it is customary for the assignee to sue in his own name, joining the assignor as co-plaintiff or as a defendant, and recently in England the highest courts have

(*z*) *Re Bland and Mohun*, 1913, 30 O.L.R. 190, 16 D.L.R. 716; *Hughes v. Pump House Hotel Co.*, [1902] 2 K.B. 190; *Mercantile Bank of London v. Evans*, [1899] 2 Q.B. 613; *Sovereign Bank v. International Portland Cement Co.*, 1907, 14 O.L.R. 511.

(*a*) *Stethers v. Borrowman*, 1916, 38 O.L.R. 12, 33 D.L.R. 179.

(*z*) R.S.O. 1914, c. 109, s. 49, quoted in §102. See *Pringle v. Hutson*, 1909, 19 O.L.R. 65.

(*b*) *Goringe v. Irwell India Rubber and Gutta Percha Works*, 1886, 34 Ch.D. 128; *Rennie v. Quebec Bank*, 1901, 1 O.L.R. 303.

(*b*) *Sovereign Bank v. International Portland Cement Co.*, 1907, 14 O.L.R. 511 (no notice to the debtor); *Trusts Corporation of Ontario v. Rider*, 1897, 27 O.R. 595, 24 O.A.R. 157 (oral assignment).

shown a tendency to dispense altogether with the assignor's presence in cases where his interest in the subject matter has ceased and his presence is not necessary for the protection of the debtor (c). In Ontario it is expressly provided by rule 85 that an assignee of a chose in action may sue in respect of it without making the assignor a party (d), and the rule enables an equitable assignee to sue in his own name where the assignment is of the whole fund and no beneficial interest is left in the assignor (e).

It is nevertheless advisable that notice of the assignment of a mortgage should be given to the mortgagor in order to prevent his making subsequent payments to the mortgagee on account of the mortgage or to prevent subsequent dealings between the mortgagor and the mortgagee which may affect the account.

If the mortgagor, without notice of the assignment, satisfies the mortgage in whole or in part by payments to the original mortgagee or has dealings with the mortgagee which affect the mortgage account (f), the assignee will take subject to such payments or dealings. The mere registration of the assignment of the mortgage will not operate as notice to the mort-

(c) Macland, *Equity and the Forms of Action*, p. 148; *Tollhurst v. Associated Cement Manufacturers*, [1903] A.C. 414, at pp. 420, 421; *Brandt's Sons & Co. v. Dunlop Rubber Co.*, [1905] A.C. 454, at p. 462; *Graham v. Crouchman*, 1917, 41 O.L.R. 22, 39 D.L.R. 284.

(d) This rule was originally derived from the former general orders of the Court of Chancery.

(e) *Graham v. Crouchman*, *supra*; cf. *Neveren v. Wright*, 1917, 39 O.L.R. 397, 36 D.L.R. 734.

(f) *Engerson v. Smith*, 1862, 9 Gr. 16; *Wilson v. Kyle*, 1880, 28 Gr. 101; *Turner v. Smith*, [1901] 1 Ch. 213, and cases cited at pp. 219-220.

(g) *Baskerville v. Otterson*, 1873, 20 Gr. 379.

gagor, because registration operates as notice only to persons subsequently acquiring an interest in the land (*h*).

§104. *Assignment subject to state of account.*

Mere notice to the mortgagor of the assignment of a mortgage will prevent subsequent dealings between the mortgagor and the mortgagee to the prejudice of the assignee, but will afford no safeguard as to past dealings. It is therefore advisable that the assignee should at the time of the assignment require either the concurrence of the mortgagor in the assignment or his written admission as to the state of the mortgage account. The mortgage debt is a chose in action and in accordance with the general rule, applicable both to equitable assignments and to assignments under the statute, the assignee takes subject to the equities affecting the subject matter, and takes subject to the state of the mortgage account between the original parties (*i*). Even though the assignee may get the conveyance of the legal estate he can hold it as security only for what is properly owing by the mortgagor at the date of the assignment (*j*).

It has been held that if nothing had ever been advanced upon a mortgage or the mortgage had been made without consideration the assignee would stand in no better position than the mortgagee (*k*), but the mortgagor may, as against the assignee, have estopped himself from denying that the money has been advanced. Under the former practice of conveyancers in England the absence of a receipt endorsed on the mortgage

(*h*) R.S.O. 1914, c. 124, s. 75; *Gilleland v. Wadsworth*, 1877, 1 O.A.R. 82, at p. 91; see chapter 8, *The Registry Act*, §73. The same rule applies under the Land Titles Acts. *Nioa v. Bell*, 1901, 27 V.L.R. 82; cf. *Peck v. Sun Life Assurance Co.*, 1905, 11 B.C.R. 215.

See also *Grace v. Kuebler and Brunner*, 1917, 56 Can. S.C.R. 1, at pp. 13, 14, 39 D.L.R. 39, at p. 47, affirming 11 A.L.R. 295, 33 D.L.R. 1.

(*i*) *Matthews v. Wallwyn*, 1798, 4 Ves. 118, 18 R.C. 243.

(*j*) *Norrish v. Marshall*, 1821, 5 Madd. 475; *Mangles v. Dixon*, 1852, 3 H.L.C. 702 at pp. 702, 707.

operated in effect as notice to the assignee that the mortgage money had not been advanced, notwithstanding that in the body of the mortgage the receipt of the money was acknowledged, but if a receipt was endorsed the assignee for value without notice that the money had not been advanced was entitled to take the mortgage on the footing that the amount acknowledged to have been received was received (*l*). It is now provided in Ontario by the Conveyancing and Law of Property Act (*m*) as follows:

6. A receipt for consideration money or securities in the body of a conveyance shall be a sufficient discharge to the person paying or delivering the same without any further receipt being endorsed on the conveyance.

7. A receipt for consideration money or other consideration in the body of a conveyance or endorsed thereon shall, in favour of a subsequent purchaser, not having notice that the money or other consideration thereby acknowledged to be received was not in fact paid or given, wholly or in part, be sufficient evidence of the payment or giving of the whole amount thereof.

In the statute just quoted the word "conveyance" includes a mortgage, charge or encumbrance (*n*). S. 6 possibly has no application if no payment has been made on a mortgage, but s. 7 applies to such a case. The expression "sufficient evidence" means conclusive evidence (*o*).

As a result of the statute a purchaser of a mortgage who has no notice (*p*) actual or constructive that the money ac-

(*k*) *McPherson v. Dougan*, 1862, 9 Gr. 268; cf. *Gould v. Close*, 1871, 21 Gr. 273.

(*l*) *Bickerton v. Walker*, 1885, 31 Ch. D. 151.

(*m*) R.S.O. 1914, c. 109, ss. 6, 7, re-enacting 49 V. c. 20, s. 10, by which in 1886 the similar provisions (ss. 54, 55) of the English Conveyancing Act, 1881, were adopted.

(*n*) See s. 2 of the statute, quoted in chapter 1, §5.

(*o*) *Jones v. McGrath*, 1888, 16 O.R. 617, at p. 623; *Lloyd's Bank v. Bullock*, [1896] 2 Ch. 192; *Bateman v. Hunt*, [1904] 2 K.B. 530.

(*p*) The receipt is of no avail to an assignee who knows that the money was not advanced. *Manley v. London Loan Co.*, 1896, 23 O.A.R.

knowledge in the mortgage to have been received has not been received by the mortgagor is entitled to rely on the acknowledgment contained in the body of the mortgage (*q*), but of course he is bound to know that since the creation of the mortgage the debt may have been reduced (*r*).

Under the Ontario Land Titles Act (*s*) the transfer of a charge is "subject to the state of account upon the charge between the chargor and the chargee," but it has been held that the assignee is affected only in so far as payments have been made subsequent to the date of the charge and that he is not affected by the fact that the amount for which the charge is expressed to be security was not in fact advanced, if he takes without notice of such fact (*t*).

The value of the mortgage debt to the transferee will depend on the soundness of the security, and he may purchase the debt and security at less than the nominal amount of the

139, at p. 145, S.C. affirmed *sub nom.* London Loan Co. v. Manley, 26 Can. S.C.R. 443.

(*q*) *Bateman v. Hunt, supra*. This was an action on the covenant and the decision would seem to exclude the distinction drawn in *Patterson v. McLean*, 1891, 21 O.R. 221, between the right to sue on the covenant and the right to foreclose. In the latter case it was held that the assignee for value without notice could not enforce the covenant for payment against a mortgagor who had received no consideration.

(*r*) *DeLisle v. Union Bank of Scotland*, [1914] 1 Ch. 22, at p. 33.

(*s*) R.S.O. 1914, c. 126, s. 54. As to provisions of the various Land Titles Acts with regard to the effect of a transfer of mortgage, see §107, *infra*.

(*t*) *Dodds v. Harper*, 1916, 37 O.L.R. 37, 32 D.L.R. 22; cf. annotation by E. D. Armour, 32 D.L.R. 26 ff. The decision was based upon the Conveyancing and Law of Property Act above quoted. Apparently in provinces where there is no corresponding statute the mortgagor would not be liable in case the money had not been advanced unless he had done some act to induce the assignee to believe that the full amount had been advanced, the acknowledgment of receipt of the money in the mortgage not being sufficient. *Swan v. Wheeler*, 1909, 2 S.L.R. 269.

debt, but notwithstanding that he has done so, he is entitled to recover the whole amount owing at the time of the transfer (*u*), unless he stands in a position which makes this inequitable, as, for instance, if he stands in a fiduciary position towards the mortgagor (*v*).

In the absence of special words, the transferee of a mortgage is not entitled to rents in arrear at the time of the transfer (*w*); and where interest is in arrear at the date of the transfer and the mortgagor does not concur, the transferee, on paying the arrears to the transferor, is not entitled to treat them as principal so as to bear future interest (*x*). The mortgagee and the persons claiming under him cannot, without the privity of the mortgagor, add to what is due or turn interest into principal (*y*).

105. *Assignment subject to equity or set-off.*

If the mortgagor has not concurred in the assignment of the mortgage the assignee takes subject to any claim existing at the date of the assignment which would form the subject of a set-off as between the mortgagor and the mortgagee in an action on the covenant (*z*).

An equity cannot be set up against the assignee unless it is existing and not merely a potential equity at the time

(*u*) Phillips v. Vaughan, 1685, 1 Vern. 335; Anon., 1707, 1 Salk. 155; Davis v. Barrett, 1851, 11 Beav. 542, 554.

(*v*) See 21 Halsbury, Laws of England, pp. 176, 177; cf. 2 W. & T.L.C. 47.

(*w*) Salmon v. Dean, 1851, 3 Mac. & G. 344.

(*x*) Ashenhurst v. James, 1746, 3 Atk. 270.

(*y*) Matthews v. Wallwyn, 1798, 4 Ves. 118, 18 R.C. 244; 21 Halsbury, Laws of England, p. 177.

(*z*) Court v. Holland, 1881, 29 Gr. 19, at pp. 20, 22, following Norrish v. Marshall, 1821, 5 Madd. 475, at p. 481; cf. Pressey v. Trotter, 1878, 26 Gr. 154; Galbraith v. Morrison, 1860, 8 Gr. 289; Roxburgh v. Cox, 1881, 17 Ch.D. 520, at p. 526.

of the assignment. For instance, A mortgages to B and then sells to C with a covenant against encumbrances, (that is to say, as between A and C, A agrees to pay off the mortgage), and C gives back a second mortgage for the balance of the purchase money. If C, in order to protect his property, pays off the first mortgage, he can set off the amount so paid against the second mortgagee. If the second mortgage is subsequently assigned, this right of set-off is good against the assignee because it is an existing equity at the time of the assignment, but if the second mortgage is assigned before C pays off the first mortgage the assignee does not take subject to the merely potential right of set-off (a).

It has been held that the assignee of a mortgage takes subject not only to an equity or a right of set-off affecting the mortgage account, but also to an equity to set aside or reform the mortgage itself, and that even as against an equity of the latter kind the assignee cannot set up the defence of purchase for value without notice so as to put himself in any better position than his transferor. The owner of land made a mortgage which though not registered was good as between the parties, and afterwards conveyed to a purchaser without notice who registered his deed and therefore took free from the mortgage. The purchaser gave back a mortgage for part of the purchase money. This second mortgage was registered, but in the hands of the mortgagee it was of course subject to the prior mortgage made by the mortgagee. It was afterwards assigned to a transferee for value without notice. It was held

(a) This distinction was drawn in the dissenting judgment of Strong V.C. in *Henderson v. Brown*, 1871, 18 Gr. 89, which was adopted as correct in *Egleston v. Howe*, 1879, 3 O.A.R. 566. In both cases the assignee had notice of the facts giving rise to the potential equity. See also *Watson v. Mid-Wales Ry. Co.*, 1867, L.R. 2 C.P. 593. Cf. *Harter v. Colman*, 1882, 19 Ch. D. 630, at p. 633, where a similar distinction is drawn in connection with the doctrine of consolidation.

that the purchaser of the second mortgage took subject to the first mortgage and could not set up the defence of purchase for value without notice (*b*). A mortgage which was made in fraud of creditors was held to be void even in the hands of an assignee for value without notice (*c*).

It was however enacted in Ontario in 1876 by the statute 39 V. c. 7, s. 10, as follows:

10. The purchaser in good faith of a mortgage may, to the extent of the mortgage, (and except as against the mortgagor, his heirs, executors and administrators,) set up the defence of purchase for value without notice in the same manner as a purchaser of the property mortgaged might do (*c*).

This section was invoked by the assignee of a mortgage in the following circumstances. A certain lot was by error included with other lands in a mortgage. The mortgage was assigned for value, and subsequently the mortgagor conveyed away the equity of redemption. The deeds were all registered in the order of their execution. In an action by the purchaser of the equity of redemption against the assignee of the mortgage to compel the defendant to rectify the error by conveying the lot in question to the plaintiff it was held (*f*) that a

(*b*) *Smart v. McEwan*, 1871, 18 Gr. 623; cf. *Cockell v. Taylor*, 1852, 15 Beav. 103, at p. 117.

(*c*) *Elliott v. McConnell*, 1874, 21 Gr. 276; but see *Totten v. Douglas*, 1869, 15 Gr. 126, 16 Gr. 243, in which in similar circumstances the purchaser of the mortgage failed only because he was put upon enquiry by his knowledge of suspicious circumstances.

(*d*) Now R.S.O. 1914, c. 112, s. 12.

(*e*) As to the circumstances in which a purchaser may rely upon the defence of purchase for value without notice, see chapter 7, *Equitable Principles governing Priorities*. It was enacted by 39 V.c. 7, s. 11, (now R.S.O. 1914, c. 109, s. 39), that "it shall in no case be necessary, in order to maintain the defence of a purchase for value without notice, to prove payment of the purchase money or any part thereof."

(*f*) *Bridges v. Real Estate Loan and Debenture Co.*, 1885, 8 O.R. 493.



complete defence was afforded by the combined operation of the section above quoted and of the provision of the Registry Act that no equitable lien, charge or interest affecting land should be deemed valid as against a registered instrument executed by the same party, his heirs or assigns (*g*). The opinion was also expressed that the defendant would have had a good defence even if the mortgagor himself had been the plaintiff, on the ground that a collateral equity to reform the mortgage is not one of the equities subject to which the assignee of the mortgage takes (*h*).

It will be observed that the plaintiff in the case just mentioned was the purchaser of the equity of redemption and was therefore not within the protection of the exception contained in the statute quoted above —“except as against the mortgagor, his heirs, executors or administrators.” The provision in question is however now part of the Mortgages Act, the excepting clause reads, “except as against the mortgagor” (*i*) and the word “mortgagor” is defined by the interpretation clause to mean “any person deriving title under the original mortgagor or entitled to redeem a mortgage, according to his estate, interest or right in the mortgaged property” (*j*). It is submitted that on a reasonable construction of the provision in question it ought to be held that the scope of the excepting clause has not been enlarged by the inclusion of the particular provision in the more general statute (*k*), but it must be admitted that on a strict construction of the re-

(*g*) R.S.O. 1914, c. 124, s. 73. See chapter 8, *The Registry Act*, §75.

(*h*) This more general question is further discussed below. See §106.

(*i*) R.S.O. 1914, c. 112, s. 12. This wording was introduced by 10 E. 7, c. 51, s. 11.

(*j*) R.S.O. 1914, c. 112, s. 2 (*d*)

(*k*) Cf. 3 & 4 G. 5, c. 2, s. 9, as to the general effect of the consolidation of the statutes.

vised statute a purchaser of the equity of redemption would be within the excepting clause. In any event the provision would still make the defence of purchase for value without notice available as against creditors of the mortgagor (*l*).

§106. *Equity to reform or avoid mortgage.*

Apart from the statute just discussed (*m*) there remains the distinction suggested above (*n*) between a collateral equity to reform a mortgage and an equity affecting the mortgage account. A similar distinction was drawn in a case in which a mortgage was transferred to a person who it was alleged purchased as trustee for the mortgagor on the understanding that the mortgagor was to be allowed to redeem the mortgage at the price paid by the transferee with an additional sum for the transferee's services. The purchaser subsequently further transferred the mortgage to an assignee without notice of the trust, and it was held that such assignee took free from the trust (1) because the trust should have been evidenced by writing and (2) because the trust was one which did not affect the mortgage account but grew out of the personal relations of the mortgagor and the first purchaser and therefore was not an equity which attached to the mortgage in the hands of the second purchaser (*o*). The correctness of the distinction drawn is, however, doubtful (*p*).

(*l*) E.g., in a case like *Elliott v. McConnell*, *supra*.

(*m*) R.S.O. 1914, c. 112, s. 12. See §105.

(*n*) In the judgment in *Bridges v. Real Estate Loan and Debenture Co.*, 1885, 8 O.R. 493, at p. 498.

(*o*) *Wright v. Leys*, 1885, 8 O.R. 88.

(*p*) In *Wright v. Leys*, the distinction is supported by the citation of *Judd v. Green*, 1875, 45 L.J. Ch. 108, 33 L.T. 597, and *Nant-y-glo and Blaina Ironworks Co. v. Tamplin*, 1876, 35 L.T. 125, in which it was held that where the mortgagor's equity was to set aside the mortgage, a transferee for value had a better equity and was entitled to his security. The decision in these cases is opposed to the general principle and is doubtful. See 21 Halsbury, *Laws of England*, pp. 177-178, note (*r*); 2 W. & T.L.C. Eq. note (*b*).

In the case of a mortgage which is voidable for fraud, it would seem that the mortgagor may set up the fraud against the assignee by way of defence as cancelling or diminishing the amount which may be claimed under the assignment (*q*).

Where a person holding land as trustee, at the request of the beneficial owners, and without any consideration to him therefor or intention to become personally liable, executed a mortgage on the land, the mortgage without his knowledge containing a covenant to pay the mortgage debt, it was held that the covenant was not enforceable against the mortgagor by the assignee of the mortgage for value and without notice, and that the assignee's remedy was restricted to proceedings against the land (*r*).

§107. *Liability of assignor to assignee.*

The assignor of a mortgage is liable to the assignee on a covenant that the mortgage is a valid and subsisting security, if before the assignment the lands have been sold for taxes (*s*). A covenant by the assignor that the mortgage is a good and valid security means, not that the mortgage is a sufficient security for the debt, but only that it is a mortgage valid in law (*t*). Upon a similar covenant it has been held that the assignor is not liable to the assignee for the costs of an unsuccessful action to enforce the security (*u*).

(*q*) *Stoddart v. Union Trust Limited*, [1912] 1 K.B. 181, at pp. 189, 190, 193. This was a case of an assignment of a chose in action arising out of contract. The defendants failed as against the assignee because they did not ask to have the contract set aside, but on the contrary, they had affirmed it and were seeking to set-off against the assignee's claim the damages for fraud which they were entitled to as against the assignor.

(*r*) *Patterson v. McLean*, 1891, 21 O.R. 221.

(*s*) *Real Estate Investment Co. v. Metropolitan Building Society*, 1883, 3 O.R. 476.

(*t*) *Agricultural Savings and Loan Co. v. Webb*, 1907, 15 O.L.R. 213.

(*u*) *Storgess v. Biner*, 1861, 11 U.C.C.P. 102.

If the assignor covenants with the assignee to pay the mortgage moneys in the event of default being made by the mortgagor, the assignor becomes a surety and he will be discharged from his liability on the covenant if the assignee, without reserving his rights against the assignor or without his consent, materially alters the terms of the mortgagor's liability, as, for example, by releasing part of the lands on payment of part of the debt (*v*) or by making a binding agreement to give time to the mortgagor; and it has been held that if an agreement for extension, made without the assignor's consent, is a material alteration of the original contract, as for example, if it contains a stipulation for an increased rate of interest, the surety is discharged notwithstanding the reservation of his rights (*w*).

But if the assignee takes a new mortgage for the same debt on the same land from a purchaser thereof from the mortgagor, with an extended time for payment, the assignee refusing at the same time to discharge the old mortgage, the assignor will not be discharged (*x*).

Where a mortgagee assigned the mortgage, covenanting for the payment of the mortgage money, and subject to an agreement between the mortgagee and the assignee that the former might have a re-assignment of the mortgage on payment of the principal and interest due thereon, and the mortgagee afterwards made payments under his covenant, it was held that he was entitled to a lien therefor as against the mortgagor (*y*).

An assignment of a mortgage by way of mortgage, called a

(*v*) *Farmers' Loan and Savings Co. v. Patchett*, 1901, 6 O.L.R. 255, affirmed 8 O.L.R. 569.

(*w*) *Bristol & West of England Land Co. v. Taylor*, 1893, 24 O.R. 286; *Trusts Corporation of Ontario v. Hood*, 1896, 23 O.A.R. 589.

(*x*) *Trusts Corporation of Ontario v. Hood*, *supra*.

(*y*) *Fleming v. Palmer*, 1866, 12 Gr. 226.

sub-mortgage or a derivative mortgage, may be made by a formal assignment of the mortgage subject to redemption, or by a deposit of the mortgage and other title deeds in which case it will be an equitable sub-mortgage (z). Under a sub-mortgage nothing can be recovered from the original mortgagor in excess of the amount due on the mortgage, and on payment of that amount the sub-mortgagee must deliver up the mortgage to the original mortgagor (a).

Where a derivative mortgagee, by representing himself to be the owner of the mortgage, obtained a release of the equity of redemption which he afterwards sold for more than was due him from his assignor, it was held that he was bound to account to the assignor for the profit (b).

If a sub-mortgage contains no covenant for payment an action cannot be maintained by the assignee against the assignor unless there is evidence of a loan. Thus where a mortgagee in consideration of \$530, acknowledged to be paid, assigned to the plaintiff a mortgage for \$360 with a proviso that the assignment should be void on payment of the \$530 and interest, but the assignor did not covenant to pay, it was held that no action could be maintained for the mortgage debt (c).

§108. *Rights and powers of the assignee.*

The assignment of the mortgage debt confers upon the assignee the right to sue on the covenant for payment (d).

(z) *Ex parte Smith, In re Hildyard*, 1842, 2 Mont. D. & DeG. 587.

(a) As to the discharge of the original mortgage in the event of a sub-mortgage having been made, see chapter 19, *Discharge or Reconveyance*, §184.

(b) *McLean v. Wilkins*, 1887, 14 Can. S.C.R. 22.

(c) *Pearman v. Hyland*, 1862, 22 U.C.R. 202; see also *Hall v. Morley*, 1853, 8 U.C.R. 584.

(d) See §§101, 102, *supra*, and chapter 23, *Action on the Covenant*, §223.

The conveyance of the mortgagee's estate confers upon the assignee the right to exercise any power incident to that estate, for instance the right to sue for foreclosure or sale in case of default (e), and the benefit of any covenant running with the land, even though the covenant is not expressly made with the assigns of the mortgagee (f).

Neither the assignment of the mortgage debt nor the conveyance of the land enables the transferee to exercise a mere personal power relating to the land, for instance, a power of sale (g) or a license to distrain (h), unless the mortgage provides that such power may be exercised by the assigns of the mortgagee (i).

Collateral securities for the mortgage debt must be assigned expressly; they do not pass under general words giving the transferee the benefit of the mortgage security. Unless the transferor has agreed to hold them for the transferee, he will, on being paid off in full by the transferee, hold them in trust for the mortgagor (j).

In Saskatchewan it is provided by the Land Titles Act as follows (k):

Upon the registration of a transfer of a mortgage, encumbrance or lease the interest of the transferor as set forth in such instrument with all rights, powers and privileges thereto appertaining shall pass to the transferee; and the transferee shall thereupon be-

(e) See §§101 and 102, *supra*, and chapter 24, *Action for Foreclosure or Sale*, §233.

(f) For a discussion of covenants running with the land, see Armour, *Real Property*, 2nd ed., pp. 379 ff.

(g) See chapter 31, *Sale under Power of Sale*, §336.

(h) See chapter 33, *Attornment and Distress*, §361.

(i) In a well drawn mortgage care will be taken to provide, either by a general clause or by the terms of the particular power that the power may be exercisable by the assigns of the mortgagee.

(j) 21 Halsbury, *Laws of England*, p. 172, citing *Glascock v. Bails*, 1889, 24 Q.B.D. 13.

(k) Sask. statutes, 1917 (2nd sess.), c. 18, s. 124.

come subject to the same liabilities as if named in the original instrument as mortgagee, encumbrancee or lessee to the extent of the interest transferred.

By virtue of every such transfer the right to sue upon any mortgage or other instrument and to recover the amount transferred or damages, and all the interest of the transferor in such amount or damages, shall vest in the transferee. Nothing herein contained shall prevent the court from giving effect to any trusts affecting such amount or damages, in case the transferee be the same as trustee for another person.

The Land Titles Acts of Alberta and the Northwest Territories and the Real Property Act of Manitoba contain substantially similar provisions (*l*).

The Land Titles Act of Ontario provides (*m*) that the transfer of a charge when registered, shall confer upon the transferee the ownership of the charge free from any unregistered interests therein, that every charge shall be subject to the state of account upon the charge between the chargor and the chargee (*n*), and the transferor shall be deemed to remain owner of such charge until the name of the transferee is entered on the register in respect thereof.

(*l*) Alta. statutes, 1906, c. 24, ss. 67, 68; R.S.C. 1906, c. 110, ss. 106, 107; R.S.M. 1913, c. 171, ss. 110, 111.

(*m*) R.S.O. 1914, c. 126, s. 54.

(*n*) See §104, *supra*.

CHAPTER XII.

EXECUTION CREDITORS OF THE MORTGAGEE.

§111. Rights of execution creditors, p. 211.

§112. Seizure of mortgage under execution, p. 211.

§113. Discharge by sheriff or bailiff, p. 214.

§111. *Rights of execution creditors.*

The question of priority under the Registry Act (a) and under the Land Titles Acts (b) as between an execution creditor of the mortgagor and a mortgagee or purchaser of the mortgaged land has already been discussed, and the rights and remedies of an execution creditor of the mortgagor in other respects are discussed in a subsequent chapter (c). The subject of the present chapter is the rights and remedies of an execution creditor of the mortgagee.

It was formerly held in Upper Canada that the interest of a mortgagee of land could not be sold under a writ of execution, even after the estate had become absolute at law by reason of the mortgagor's default, because the mortgagee held the land as security for a debt and the effect of a sale under execution would be to separate the estate and the debt (d). The law was, however, changed by statute in Ontario (e).

§112. *Seizure of mortgage under execution.*

It is now provided by the Execution Act, R.S.O. 1914, c. 80, ss. 25 to 28, as follows:

(a) See chapter 8, *The Registry Act*, §76.

(b) See chapter 10, *The Land Titles Acts*, §96.

(c) See chapter 16, *Execution Creditors of the Mortgagor*.

(d) *Lodor v. Creighton*, 1860, 9 U.C.C.P. 295; *Parke v. Riley*, 1866, 3 U.C.E. & A. 215, at pp. 228, 231, 232.

(e) 56 V. c. 5. The present provisions are set out in §§112, 113, *infra*.

25.—(1) If a sheriff is informed on behalf of the execution creditor that the execution debtor is a mortgagee of land and that the mortgage is registered, or that he is entitled to receive a sum of money charged upon land by virtue of a registered instrument, and if the sheriff is required on behalf of the execution creditor to seize the mortgage or charge, and is furnished in writing with the information necessary to enable him to give the notice hereinafter mentioned, he shall, upon payment of the proper fees, forthwith deliver or transmit to the registrar or master of titles in whose office the mortgage or other instrument is registered, who shall forthwith register the same, a notice in the form or to the effect following:

To the registrar of (or as the case may be)

By virtue of an execution issued out of the Supreme Court of Ontario (or as the case may be)

whereby I am commanded to levy of the goods and chattels of A. B. \$ for debt, and \$ for costs

lately adjudged to be paid by A. B. to C. D., besides the costs of execution, I have this day seized and taken execution all the estate, right, title and interest of A. B. in a mortgage made by X. Y. to A. B., bearing date the day of 19

and registered in the registry office of the County of

(or as the case may be) on the day of 19 as number (or the said mortgage or other instrument may

be described in any other manner by reference to dates, parties and the land covered as will enable the notice to be registered against the land therein described) and in the money secured thereby, and this notice is given for the purpose of binding the interest of A. B. under sections 25 to 29 of The Execution Act.

Dated this day of 19

(Signed) M. N.,

Sheriff of the County (or District) of

(2) Upon registration of the notice the interest of the execution debtor in the mortgage or other instrument, and in the land therein described, and in the money thereby secured and in all covenants and stipulations for securing payment thereof, shall be bound by the execution, and such registration shall be notice of the execution and seizure to all persons who may thereafter in any way acquire any interest in the mortgage, land, money or covenants; and the rights of the sheriff and of the execution creditor shall have priority over the rights of all such persons subject, as regards the mortgagor or person liable to pay the money secured by the mortgage or charge, to the next following section.

26.—(1) A notice similar to that mentioned in the next preceding section shall also be served upon the mortgagor or the person who is liable to pay the money secured by the registered instrument; and after such service the person served shall pay to the sheriff all

money then payable and, as it becomes due, all money which may become payable to the execution debtor so far as may be necessary to satisfy the execution.

(2) Service of the notice may be made personally, or by leaving the same at the dwelling-house of the person to be served with a grown up person residing there, or by registered post to the proper address of the person to be served.

(3) Any payment made after service of the notice or after actual knowledge of the seizure shall be void as against the sheriff and execution creditor.

27. In addition to the remedies herein provided, the sheriff may bring an action on such mortgage or other instrument for the sale or foreclosure of the land covered by it, and shall be entitled to a bond of indemnity as in the cases provided for in section 23.

28.—(1) Upon an execution, notice whereof is registered under section 25, expiring or being satisfied, set aside or withdrawn, a certificate of such fact shall be given by the sheriff or by the execution creditor, and the same or the order to set aside, as the case may be, may be registered; and thereupon such seizure shall be vacated and be at an end.

(2) The order or the certificate of the sheriff shall not require verification.

(3) The certificate of the execution creditor shall be verified by the oath of a subscribing witness as in the case of other instruments affecting land.

It is provided by s. 2 (b) that "Sheriff" shall include any officer to whom an execution is directed.

Where an execution debtor who was a mortgagee assigned the mortgage prior to the registration of a notice of seizure of the mortgage under s. 25, but the assignment was not registered until afterwards, it was held that the execution creditor was not entitled to insist upon the sheriff's taking further proceedings without indemnifying him against costs, and that as the sheriff was not authorized to realize upon the security except by action he was not subject to any suit or proceeding by the assignee of the mortgagee and was not entitled to relief by way of interpleader. "In other words, the statute authorizes the seizure of the mortgagee's interest, and where there has been an assignment of that interest, whether registered or not, and whether *bona fide* or not, . . . the sheriff's

214 CHAPTER XII. EXECUTIONS AGAINST MORTGAGEE.

hands are tied until the execution creditors have in action obtained a declaration of the Court that the assignment is void" (f).

It is provided by the Land Titles Act, R.S.O. 1914, c. 126, s. 64, as follows:

64.—(1) The seizure under execution or other process of a mortgage or charge, or of leasehold land registered under this Act, shall not take effect until a certificate of the sheriff or other officer that he has taken such mortgage, charge or leasehold land under such process against the registered owner thereof is lodged with the proper Master of Titles.

(2) The certificate shall state the number of the parcel under which the land affected is registered and the name of the owner, and shall be noted by the Master in the register.

(3) This section shall not apply where the proceedings prescribed by section 25 of *The Execution Act* have been taken with respect to a mortgage or charge.

§113. *Discharge by sheriff or bailiff.*

It is provided by the Registry Act, R.S.O. 1914, c. 124, s. 68, as follows:

68.—(1) Where a sheriff, bailiff of a Division Court or other officer, under a writ or warrant of execution against goods, seizes a mortgage belonging to the person against whose goods the writ or warrant has issued, on or affecting land in Ontario, the payment of the mortgage money in whole or in part to the sheriff, bailiff or other officer by the mortgagor or any other person or any person claiming under him, shall satisfy the mortgage to the extent of such payment.

(2) After payment of the mortgage money or any part thereof, the sheriff, bailiff or other officer shall, at the request and expense of the person requiring the same, give a certificate, Form 11, under the hand and seal of office of the sheriff or other officer, or under the hand of the bailiff and the seal of the court of which he is bailiff.

(3) Upon the written request of the bailiff the clerk of the court shall affix to the certificate the seal of the court; and he shall file the request of the bailiff in his office.

(4) The execution of the certificate shall be proved in the same manner as in the case of other instruments affecting land, and the certificate shall be registered in the same manner as other certificates of discharge.

(5) The certificate when registered, if the same is of payment

(f) *Keenan v. Osborne*, 1904, 7 O.L.R. 134.

in full of the mortgage, shall be as valid and as effectual in law as a release of the mortgage and as a conveyance to the mortgagor, his heirs, executors, administrators or assigns, or any person lawfully claiming by, through or under him or them, of the original estate of the mortgagor as if executed by the execution debtor (g).

(6) The certificate when registered, if the same is of payment of only a part of the mortgage money, shall be as valid and effectual in law as a release of the mortgage as to such part, as if executed by the execution debtor.

(7) Where a mortgage has been seized by a sheriff or bailiff of the Division Court or other officer in the manner provided by law, and such seizure has been withdrawn, vacated or for any other reason set aside, the sheriff, bailiff or other officer under whose hand notice of seizure has issued, may give a certificate directed to the registrar in whose office the notice of seizure is registered, to the effect that such seizure has been withdrawn, vacated or set aside as the case may be, and such certificate shall be registered in the registry office in the same manner and for the same fee as a discharge of mortgage (h).

Form 11 above referred to is as follows:

To the Registrar of the Registry Division of
I, A. B., of _____ sheriff of the County (or District)
of _____ [or Bailiff of the (number) Division Court of the
County (or District) of _____] do certify that by virtue of
an execution wherein C. D. is plaintiff and E. F. defendant, issued
out of the Supreme Court (or as the case may be) and to me directed,
I seized a certain mortgage made by one T. H. of (as described
in the mortgage) bearing date the _____ day of _____
19____, and registered at _____ of the clock in the _____ on,
of the _____ day of _____ in Book _____ f.
as No. _____ to E. F. of (as described in the mortgage),
the defendant in the said execution named, and such mortgage has
not been assigned (or has been assigned to the defendant: here set
out date and date of registration of assignment) and I do further
certify that I have received from the said mortgagor (or from the
executors, administrators or assigns of the said mortgagor, as the
case may be), the full amount of said mortgage (or \$
part of the mortgage money), and that such mortgage is therefore
discharged (or that such mortgage is as to \$ _____ part
of the money thereby payable, _____ discharged).

As witness my hand and seal of office (or the seal of the said
court) this _____ day of _____ 19____
Witness _____)
A. B.

(g) As to the effect of a discharge of mortgage, when registered,
see chapter 19, *Discharge or Reconveyance*, §184.

(h) Sub-s. 7 was added in 1918 by 8 G. 5, c. 27, s. 9.

CHAPTER XIII.

PERSONS ENTITLED ON DEATH OF THE MORTGAGEE.

- §121. Mortgage security is personalty, p. 216.
- §122. Legal estate formerly devolved as realty, p. 217.
- §123. The Devolution of Estates Act, p. 219.
- §122. Payment in case of death of mortgagee, p. 222.
- §125. Transmission under the Land Titles Acts, p. 225.

§121. *Mortgage security is personalty.*

It has already been pointed out that if the mortgagee died before the day fixed for payment of the mortgage the money, as part of his personal estate, was at law payable to his executor and not to his heir, unless the heirs were named, and that if the day for payment were past the money was in equity payable to the executor even though the heirs were named (*a*).

It has long been settled that a mortgage security is personal estate (*b*), and so long as the equity of redemption is not extinguished the mortgagee's beneficial interest continues to be personal estate, notwithstanding that he may have entered into possession (*c*). Even apart from the Devolution of Estates Act it devolves on the personal representative and would not pass under a general devise of real property (*d*).

(*a*) See chapter 3, *Legal Mortgage in Equity*, §21.

(*b*) 21 Halsbury, Laws of England, p. 182, note (*q*).

(*c*) *Noy v. Ellis*, 1676, 2 Cas. in Ch. 220; *In re Loveridge*, *Drayton v. Loveridge*, [1902] 2 Ch. 859. When the equity of redemption of freehold is extinguished, the mortgagee's interest ceases to be personalty. *In re Loveridge*, *Pearce v. Marsh*, [1904] 1 Ch. 518.

(*d*) 21 Halsbury, Laws of England, p. 184; *Strode v. Russel*, 1708, 2 Vern. 621; *Casborne v. Scarfe*, 1737, 1 Atk. 603, reporter's note at p. 605, 18 R.C. 369, at p. 373.

§122. *Legal estate formerly devolved as realty.*

Formerly, however, the legal estate in the mortgaged land devolved according to the ordinary rules applicable to property held absolutely and not by way of mortgage. If a mortgagee of freehold died intestate or did not devise the mortgaged land, the legal estate descended to the heir at law, although the mortgage debt devolved on the executor or administrator (c). In such a case the heir held the legal estate as trustee for the executor or administrator and was bound to convey it accordingly. The mortgagee might by his will devise the legal estate to one person and bequeath the mortgage debt to another, in which case the devisee became a trustee, first, for the executor, and after his assent for the legatee. Frequently, in order to avoid the inconvenience arising from the separation of the legal estate and the right to the mortgage debt, testators expressly devised all legal estates vested in them by way of mortgage to their executors, so as to enable the latter effectually to deal with the mortgages without recourse to any other persons. A general devise of real estate would pass the legal estate in land held by way of mortgage in the absence of a contrary intention appearing from the will (f).

The inconvenience arising from the separation of the legal estate and the right to the mortgage debt, where the mortgagee died intestate or did not devise the mortgaged land to his executor, was remedied in Ontario by the provision of the statute 14 & 15 V. c. 7, s. 8, which, as amended by 32 V. c. 10, s. 2, is now contained in the Mortgages Act, R.S.O. 1914, c. 112, s. 10, as follows:

10. Where a person entitled to any freehold land by way of mortgage has died, and his executor or administrator has become

(c) *Hunter v. Farr*, 1864, 23 U.C.R. 324; *Doc dem. Slason v. Hanson*, 1857, 8 N.B.R. (3 Allen) 427.

(f) *In re Stevens' Will*, 1868, L.R. 6 Eq. 597, 18 R.C. 238, and editor's notes at p. 240; cf. 21 Halsbury, *Laws of England*, p. 182 note (q).

entitled to the money secured by the mortgage, or has assented to a bequest thereof, or has assigned the mortgage debt, such executor or administrator, if the mortgage money was paid to the testator or intestate in his lifetime, or on payment of the principal money and interest due on the mortgage, or on receipt of the consideration money for the assignment, may convey, assign, release or discharge the mortgage debt and the mortgagee's estate in the land; and such executor or administrator shall have the same power as to any part of the land on payment of some part of the mortgage debt, or on any arrangement for exonerating the whole or any part of the mortgaged land, without payment of money; and such conveyance, assignment, release or discharge shall be as effectual as if the same had been made by the persons having the mortgagee's estate (*g*).

Under this statute the mortgagee's estate is not vested in his personal representative, but the latter may, nevertheless, in certain circumstances, convey, assign, release or discharge such estate as if it were vested in him (*h*).

When a tenant in fee simple dies, without having alienated his lands in his lifetime or by his will (either of which prevents escheat) and without leaving any blood relation to succeed him as his heir, such lands will fall into the lord of whom they were held (*i*), that is, in Canada to the Crown in right of the Dominion of Canada in the case of Alberta (*j*), Saskatchewan, the Northwest Territories and Manitoba (*k*), and in right of the province in the case of any of the other provinces

(*g*) As to the history of this provision, see *Dilke v. Douglas*, 1880, 5 O.A.R. 63, at pp. 70, 71.

(*h*) As to discharge, see chapter 19, *Discharge or Reconveyance*, §185.

(*i*) Williams, Real Property, 21st ed., p. 56.

(*j*) *Trusts and Guarantee Co. v. The King*, 1916, 54 Can. S.C.R. 107, 32 D.L.R. 469, affirming 15 Can. Ex. R. 403, 26 D.L.R. 129. See article by Walter S. Scott in 37 C.L.T. 764 (November, 1917).

(*k*) *Lefroy*, Canada's Federal System, pp. 725-6, citing the report of Sir Alexander Campbell, 25th August, 1885, upon the Manitoba statute 47 V. c. 26, respecting escheats and forfeitures of estates of insolvents; Hodgins, Provincial Legislation, 1867-1895, at pp. 838-9, 853, 856.

(*l*). Lands vested in any person upon any trust or by way of mortgage are subject to escheat in so far as they have not been exempted by statute (*m*). The opinion has been expressed that a lord who is in by escheat would be bound by an equity of redemption, if not by a trust (*n*). It is now provided in England (*o*) and in Ontario (*p*) that where there is no heir or personal representative of a trustee or mortgagee who has died intestate as to land or where a trustee or mortgagee has died and it is uncertain who is his heir or personal representative, the court may, subject to the conditions mentioned in the statute, make an order vesting the land in such person or persons, in such manner, and for such estate as the court may direct.

§123. *The Devolution of Estates Act.*

By the Devolution of Estates Act, 1886, which applied only to the estates of persons dying on or after the 1st of July, 1886, it was provided that (a) all estates of inheritance in fee simple, or limited to the heir as special occupant, in any tenements or hereditaments in Ontario, whether corporeal or

(*l*) *Attorney-General of Ontario v. Mercer*, 1883, 8 App. Cas. 767, reversing 5 Can. S.C.R. 538.

(*m*) Coote, *Law of Mortgages*, 8th ed., vol. 1, p. 665; cf. *Re Rayercraft*, 1910, 20 O.L.R. 437; In England by 4 & 5 W. 4, c. 23, ss. 3, 5, re-enacted by 13 & 14 V. c. 60, ss. 46, 47, it was provided that no lands vested in any person upon any trust or by way of mortgage should escheat or be forfeited by reason of the attainder or conviction for any offence of such trustee or mortgagee except as regards any beneficial interest of such trustee or mortgagee. See now the provisions of the Trustee Act, 1893, 56 & 57 V. c. 53, mentioned below.

(*n*) *Downe (Viscount) v. Morris*, 1844, 3 Hare 394; cf. *Lewin, Law of Trusts*, 12th ed., pp. 277-279.

(*o*) 13 & 14 V. c. 60, ss. 15, 19, replaced by the Trustee Act, 1893, 56 & 57 V. c. 53, ss. 26, 29.

(*p*) R.S.O. 1914, c. 121, ss. 6, 9. See chapter 19, *Discharge or Reconveyance*, §186, for the text of the provisions as to mortgagees. As to the escheat of the interest of a *cestui que trust* or a mortgagor, see chapter 17, *Persons entitled on death of the Mortgagor*, §161.

incorporeal, (b) chattels real in Ontario, and (c) all other personal property of any person who had died domiciled in Ontario, which was vested in any person, should on his death, notwithstanding any testamentary disposition, devolve upon and become vested in his legal personal representatives from time to time, and subject to the payment of his debts; and that so far as the property was not disposed of by deed, will, contract or other effectual disposition, it should be distributed in the same manner as personal property not so disposed of (q).

In 1910 (r) these provisions of the Devolution of Estates Act were superseded by the provision which is now contained in R.S.O. 1914, c. 119, s. 3, as follows:

3.—(1) All real and personal property which is vested in any person without a right in any other person to take by survivorship shall, on his death, whether testate or intestate, and notwithstanding any testamentary disposition, devolve to and become vested in his personal representative from time to time as trustee for the persons by law beneficially entitled thereto and, subject to the payment of his debts, and so far as such property is not disposed of by deed, will, contract or other effectual disposition, the same shall be administered, dealt with and distributed as if it were personal property not so disposed of.

(2) This section shall apply to property over which a person executes by will a general power of appointment as if it were property vested in him.

(3) This section shall not apply to estates tail or to the personal property, except chattels real, of any person who, at the time of his death, is domiciled out of Ontario.

In the same year (s) there was enacted a provision, specially applicable to property vested in trust or by way of

(q) 49 V. c. 22, ss. 2, 3, 4. Clause (a) was amended in 1902 so as to make the statute applicable to "all estates of inheritance in fee simple, and all estates held by the deceased for the life of another, in any tenements or hereditaments in Ontario whether corporeal or incorporeal." 2 E. 7, c. 1, s. 3.

(r) 10 E. 7, c. 56, s. 3, adopting in substance the language of the English Land Transfer Act, 1897, s. 1.

(s) 10 E. 7, c. 56, s. 8, adopting in substance the language of the

mortgage, which is now contained in the Devolution of Estates Act, R.S.O. 1914, c. 119, s. 8, as follows:

8. Where an estate or interest of inheritance in real property is vested on any trust or by way of mortgage in any person solely the same shall on his death, notwithstanding any testamentary disposition, devolve to and become vested in his executor or administrator in like manner as if the same were personal estate vesting in him and, accordingly, all the like powers for only one of several joint executors or administrators as well as for a single executor or administrator and for all the executors and administrators together to dispose of and otherwise deal with the same shall belong to the deceased's executor or administrator with all the like incidents but subject to all the like rights, equities and obligations as if the same were personal estate vesting in him, and for the purposes of this section the executor or administrator of the deceased shall be deemed in law his heirs and assigns within the meaning of all trusts and powers.

The effect of these statutes is to render unnecessary and inoperative any devise of mortgaged land so far as the legal estate is concerned as that estate now devolves on the personal representative of the mortgagee notwithstanding any testamentary disposition.

It is further provided by the Devolution of Estates Act, s. 7, as follows:

7. When any part of the real property of a deceased person vests in his personal representative under this Act such personal representative, in the interpretation of any Act of this Legislature, or in the construction of any instrument to which the deceased was a party, or under which he is interested, shall, while the estate remains in him, be deemed in law his heir, as respects such part, unless a contrary intention appears; but nothing in this section shall affect the beneficial right to any property, or the construction of words of limitation of any estate in or by any deed, will or other instrument.

English Conveyancing Act, 1881, s. 30 except that in the English Act the words "a chattel real" occur instead of "personal estate" and the opening words are "where an estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal, is vested on any trust, or by way of mortgage." As to the English legislation, see 18 R.C. at pp. 241-243.

It is further provided by the Devolution of Estates Act that real property not disposed of, conveyed to, divided or distributed among the persons beneficially entitled thereto, by the personal representative within three years after the death of the deceased person shall, subject to the Land Titles Act in the case of land registered under that Act, at the expiration of that period be thenceforward vested in the persons beneficially entitled thereto under the will or upon the intestacy or their assigns without any conveyance by the personal representative. The vesting of the property under the statute may, however, be postponed, or, in some circumstances, defeated after having taken place, by the registration or successive registrations of a caution or cautions by the personal representative (*t*). If the will has not been proved or registered or, in the case of intestacy, if letters of administration have not been granted, no title to lands will vest in the persons beneficially entitled, or in any purchaser from them unless and until the consent in writing of the Treasurer of Ontario to the vesting of such title, or a certificate of the registrar of the proper surrogate court showing that a statement has been filed under the Succession Duty Act, has been registered (*u*).

§124. *Payment in case of death of mortgagee.*

It is provided in Ontario by the Mortgages Act, R.S.O. 1914, c. 112, s. 11, as follows:

11. The payment in good faith of any money to and the receipt thereof by the survivor or survivors of two or more mortgagees, or the executors or administrators of such survivor, or their or his assigns, shall effectually discharge the person paying the same from

(*t*) R.S.O. 1914, c. 119, ss. 13 ff. This statutory vesting without conveyance was originally enacted in 1891 by 54 V. c. 18, the period mentioned being twelve months. The period was in 1902 extended to three years by 2 E. 7, c. 17.

(*u*) Added in 1918 by 8 G. 5, c. 20, s. 22.

seeing to the application or being answerable for the misapplication thereof, unless the contrary is expressly declared by the instrument creating the security (v).

A similar provision is embodied in the Trustee Act, R.S.O. 1914, c. 121, s. 26, the differences in wording being that the latter section omits the words "in good faith" and the words "unless the contrary is expressly declared by the instrument creating the security."

It seems impossible to reconcile these provisions, and therefore it is apprehended that in case of conflict the first one (in the Mortgages Act) must give way to the second (in the Trustee Act) (w).

There is nothing in the enactment just quoted which affects the general rule that payments to trustees must be made to all the trustees jointly, or on their joint receipt, or to their attorney authorized by them all to receive the money, though the receipt of one of several executors would be good (x).

In cases not covered by the statute the person paying money to the survivor of two mortgagees is still subject to the equitable obligation to see to the application of the money. The statute applies only to the payment of money and does not protect a mortgagor who, instead of actually paying the

(v) This section is similar in terms to a provision contained in the English statute 7 and 8 V.c. 76. The English statute was, however, repealed by 8 and 9 V.c. 106, and four years after its repeal in England it was enacted in Upper Canada. See *Dilke v. Douglas*, 1880, 5 O.A.R. 63, at pp. 76, 77, where the reasons for the repeal of the statute in England are stated and its meaning is explained.

(w) *Armour, Real Property*, 2nd ed., p. 215, referring to *Boston v. Lelièvre*, 1870, L.R. 3 P.C. 157, at p. 162, where it was held that consolidated statutes must be construed collectively and with reference to one another, just as if they were sections of one statute instead of being separate acts.

(x) *Ewart v. Snyder*, 1867, 13 Gr. 55, at p. 57.

debt, enters into some different arrangement for securing it (y).

It is further provided by the Mercantile Law Amendment Act, R.S.O. 1914, c. 133, s. 4, as follows:

4. -(1) Where in a mortgage or an obligation for payment of money, or a transfer of mortgage or of such obligation, made after the 1st day of July, 1886, the sum, or any part of the sum, advanced or owing is expressed to be advanced by or owing to more persons than one out of money, or as money, belonging to them on a joint account, or where a mortgage, or such an obligation, or such a transfer is made to more persons than one, jointly, and not in shares, the mortgage money, or other money or money's worth, for the time being due to such persons on the mortgage or obligation, shall be deemed to be and remain money or money's worth belonging to those persons on a joint account, as between them and the mortgagor or obligor; and the receipt in writing of the survivors or last survivor of them, or of the personal representatives of the last survivor, shall be a complete discharge for all money or money's worth for the time being due, notwithstanding any notice to the payer of a severance of the joint account.

(2) This section shall apply only if and as far as a contrary intention is not expressed in the mortgage, or obligation or transfer, and shall have effect subject to the terms thereof.

An action for foreclosure may be maintained by the survivor of two mortgagees on a joint account (z).

Where a mortgagee of land has died without having entered into the possession or into the receipt of the rents and profits thereof, and the money due in respect of the mortgage has been paid to a person entitled to receive the same or such person consents to an order for the reconveyance of the land,

(y) *Dilke v. Douglas, supra.* In any case it appears that in view of the present provisions of the Registry Act even in the case of actual payment the surviving mortgagee cannot alone execute a discharge which upon registration will operate as a reconveyance. As in the case of the death of a sole mortgagee or of both or all of two or more mortgagees, the personal representatives of the deceased mortgagee or mortgagees must join in executing the discharge. See chapter 19, *Discharge or Reconveyance*, §185.

(z) See chapter 24, *Action for Foreclosure or Sale*, §233.

the court may in certain circumstances make a vesting order (a).

In case of a bequest of a mortgage indebtedness to the mortgagor, the executors may be compelled to discharge the mortgage before payment by the mortgagor of his other indebtedness to the estate (b).

§125. *Transmission under the Land Titles Acts.*

In Manitoba, Saskatchewan, Alberta, and the Northwest Territories, land, upon the death of the owner, passes to his personal representative (c).

Provision is made by the Real Property Act of Manitoba and the Land Titles Acts of Saskatchewan, Alberta, the Northwest Territories and Ontario for the registration, on his own application, of the person entitled by transmission to any land, mortgage or encumbrance (land or charge in the case of Ontario).

The Manitoba Real Property Act provides that if the applicant becomes registered as the owner of any land, mortgage or encumbrance as executor or administrator of a deceased person he shall thereupon, in case of mortgage or encumbrance, be invested with all the rights and powers which the deceased owner was possessed of (d), and that

every certificate of title issued to an executor or administrator or trustee under a will . . . shall describe the owner as such executor, administrator or trustee, and the will shall be deemed to be embodied in and to form part of the certificate of title; and the executor, administrator or trustee shall, when so described, hold the land in respect of which he is registered upon the trusts and for the

(a) See chapter 19, *Discharge or Reconveyance*, §186.

(b) *Archer v. Severn*, 1886, 12 O.R. 615, 14 O.A.R. 723.

(c) R.S.M. 1913, c. 54, s. 21; R.S.S. 1909, c. 43, s. 21, *Sask. statutes*, 1917 (2nd sess.), c. 18, s. 140; *Alta. statutes*, 1906, c. 19, s. 2; R.S.C. 1906, c. 110, s. 5. See Thom, *The Canadian Torrens System*, pp. 249 ff. for a discussion of the subject of transmission.

(d) R.S.M. 1913, c. 171, s. 128.

purposes to which the same is subject by law, and, before registering any dealing with the land, the district registrar shall satisfy himself that such dealing is in accordance with such trusts or purposes (e).

In Saskatchewan, Alberta and the Northwest Territories it is provided that upon the registration of the application and the documents authorizing the executor or administrator to administer the estate of the deceased owner the executor or administrator shall be deemed to be the owner of the land, mortgage or encumbrance, as the case may be (f), and it is further provided in Alberta and the Northwest Territories that

any person registered in place of a deceased owner shall hold the land in respect of which he is registered upon the trusts and for the purposes to which the same is applicable by this Act or by law and subject to any trusts and equities upon which the deceased owner held the same; but for the purpose of any registered dealings with such land he shall be deemed to be the absolute and beneficial owner thereof (g).

In Saskatchewan a provision similar to that just quoted was formerly in force, but it is now provided in that province as follows:

(1) For the purpose of registered dealing the person to whom land of a deceased owner has been transmitted shall, subject to the next following subsection, be considered the absolute owner thereof, but he shall nevertheless hold the land upon the trusts and subject to any equitable claims with which it was affected before transmission.

(2) The registrar shall not register any transfer, mortgage or other instrument executed by the executor or administrator except an application for transmission or a caveat or a discharge of mortgage, unless:

(a) A certificate of the official guardian made subsequent to the date of grant of letters probate or administration, or of resealing

(e) R.S.M. 1913, c. 171, s. 76.

(f) Sask. statutes, 1917 (2nd sess.), c. 18, ss. 141, 142; Alta. statutes, 1906, c. 24, ss. 74, 75; R.S.C. 1906, c. 110, ss. 115, 120.

(g) Alta. statutes, 1906, c. 24, s. 76; R.S.C. 1906, c. 110, s. 121.

thereof, that he has satisfied himself that there are no infants interested in the estate of the deceased owner, has been filed with the registrar; or

(b) The instrument to be registered is accompanied by the consent of the official guardian to the proposed dealing; or

(c) The instrument to be registered is accompanied by an order of a judge of a court of competent jurisdiction, authorizing the the proposed dealing (h).

In Ontario it is provided that

any person registered in the place of a deceased owner shall hold the land or charge in respect of which he is registered, upon the trusts and for the purposes to which the same is applicable by law and subject to any unregistered estates, rights, interests, or equities subject to which the deceased owner held the same; but otherwise in all respects, and in particular as respects any registered dealings with such land or charge, he shall be in the same position as if he had taken such land or charge under a transfer for a valuable consideration (i).

It will be observed that all the statutes referred to are similar in effect as regards the relations between the personal representative or trustee in whose name the land or mortgage is registered and the persons beneficially entitled, but as regards dealings between the registered owner and third parties there are fundamental differences.

In Alberta and the Northwest Territories no duty is cast upon the registrar of satisfying himself that the registered owner in making a transfer or mortgage of the deceased owner's interest is acting in accordance with the trusts, and a purchaser or mortgagee taking in good faith from the registered owner will obtain a good title upon registration even though the registered owner is guilty of a breach of trust. In Saskatchewan also the purchaser or mortgagee from the registered owner will obtain a good title in similar circumstances upon registration. The beneficiaries of the estate of the deceased owner are to some extent protected by the provision of the statute prohibiting the registrar from registering a transfer

(h) Sask. statutes, 1917 (2nd sess.) c. 18, s. 146.

(i) R.S.O. 1914, c. 126, s. 59.

or mortgage executed by the registered owner unless the instrument is accompanied by the certificate or consent of the official guardian or the order of a judge, but in other respects the registrar, as in Alberta and the Northwest Territories, is under no responsibility as to the right of the registered owner to make the transfer or mortgage.

In Manitoba, on the other hand, if a person applies to be registered as owner in his capacity of executor, administrator or trustee under a will, he is described as such in the certificate of title, and no instrument executed by him can be registered until the registrar satisfies himself that it is in accordance with the trusts or purposes upon or for which the registered owner holds the land. The right of the registered owner to make a transfer or mortgage, and the duty of the registrar in deciding whether an instrument should be registered, are therefore governed by the ordinary principles of law relating to executors, administrators and trustees (j).

The provisions of the Ontario statute above quoted are not so specific as those of the Manitoba statute, but according to the practice actually followed in Ontario, the result is in some respects similar. A person who applies to be registered as owner in his capacity of executor or administrator is so described on the register, and a transfer or mortgage made by him cannot be registered until the master of titles is satisfied that such executor or administrator has power, either by the terms of the will or under the Devolution of Estates Act or other statutory authority, to transfer or to mortgage for the purpose proposed.

(j) Cf. Thom, *The Canadian Torrens System*, pp. 252, 253. In the case of Manitoba, as in the case of the other provinces, the general rule is that no memorandum or entry of any notice of trusts shall be made upon the register. See the statutory provisions referred to in chapter 10, *The Land Titles Acts*, §97. The treatment in Manitoba of trusts arising under a will is therefore exceptional.

PART IV.
PERSONS CLAIMING UNDER THE
MORTGAGOR.

CHAPTER XIV.

TRANSFeree OF THE EQUITY OF REDEMPTION.

- §131. Mortgage of the equity of redemption, p. 229.
- §132. Absolute transfer of the equity of redemption, p. 230.
- §133. Personal liability of mortgagor to mortgagee, p. 233.
- §134. Obligation of transferee to indemnify transferor, p. 234.
- §135. Mortgagee entitled to enforce indemnity only if it is assigned to him, p. 239.
- §136. Mortgagee may disable himself from enforcing indemnity, p. 241.
- §137. Marshalling and subrogation, p. 243.
- §138. Case of transfer of one of two parcels subject to a common mortgage, p. 245.
- §139. Case of transfer to different persons of two parcels subject to a common mortgage, p. 246.

§131. *Mortgage of the equity of redemption.*

If the owner of land has mortgaged it he retains merely an interest which is usually called his equity of redemption (a). He may subsequently either mortgage this interest or transfer it absolutely.

(a) Of course if the mortgagor has not made default he has a legal or contractual right to redeem, and the term "equity of redemption" only becomes appropriate after the legal or contractual right has been forfeited. This distinction is, however, not important for the purpose of this chapter, and therefore it is convenient to follow here the usual practice of referring to the interest which the mortgagor has in the mortgaged lands as his equity of redemption.

The former transaction in common parlance is a second mortgage of the land, although in fact, if the first mortgage is a legal mortgage, the subject matters of the two mortgages are different. The second mortgage is a mortgage not of the land itself but merely of the right to redeem the first mortgage (*b*). The effect is to transfer to the second mortgagee the right to redeem the first mortgage and to create in favour of the second mortgagor a new right to redeem the second mortgage. So the mortgagor may by a third mortgage transfer his right to redeem the second mortgage and create in his own favour a new right to redeem the third mortgage, and this process may be continued indefinitely. The result always is that the mortgagor retains only the right to redeem the latest mortgage, he having transferred his right to redeem the earlier mortgages (*c*). At any given time the mortgagor's so-called equity of redemption consists of the right to redeem the latest mortgage, and he may either mortgage that equity or transfer it absolutely.

§132. *Absolute transfer of the equity of redemption.*

If the mortgagor transfers the equity of redemption absolutely, the effect is that the transferee becomes the person entitled to redeem the only mortgage or the latest mortgage, as the case may be, and the mortgagor retains no interest in the land (*d*). The new owner of the equity of redemption

(*b*) If the first mortgage is a legal mortgage the second mortgage is necessarily an equitable mortgage. See chapter 5, *Equitable Mortgages*, §41.

(*c*) See chapter 25, *Action for Redemption*, §251.

(*d*) The vendor may of course have a lien for unpaid purchase money, either secured by a mortgage from the purchaser or not so secured. As to the validity of the equitable lien, or of the mortgage taken to secure it, as against subsequent purchasers or mortgagees, see chapter 7, *Equitable Principles governing Priorities*, chapter 9, *The Registry Act*, and chapter 10, *The Land Titles Acts*.

may now either mortgage the equity of redemption or transfer it absolutely, and as often as the equity of redemption is transferred absolutely the same alternative presents itself.

It is therefore apparent that the transfer of the equity of redemption, which is the subject of this chapter, may be a transfer by the original mortgagor or a transfer by a person who is himself a transferee of the equity of redemption, and that the subject matter of the transfer always is the right to redeem the latest mortgage only, if there are two or more mortgages.

A mortgagor may assign any rights incident to his ownership of the equity of redemption (*e*), but where the equity of redemption was valueless, and an assignment thereof was made merely for the purpose of enabling the assignee to impeach for the benefit of the assignor a prior mortgage on the ground of fraud, the assignment was held to savour of champerty and no relief was granted to the assignee (*f*). Where, however, the assignee takes beneficially and the assignment is not made merely to enable him to sue in respect of the alleged fraud, it would seem that he may maintain the action (*g*).

A mortgagor cannot, to the injury of an assignee of the equity of redemption, receive rent from a tenant of the mortgaged premises in advance. Where, therefore, a mortgagor made a lease of the mortgaged lands, and gave an order for rent in advance to the mortgagee, to be, and which was, applied by him in discharge of other liabilities of the mortgagor, who afterwards transferred his equity of redemption to an

(*e*) *Steers v. Rogers*, [1893] A.C. 232.

(*f*) *Muchall v. Banks*, 1862, 10 Gr. 25; and see *Little v. Hawkins*, 1872, 19 Gr. 267; *Wigle v. Settrington*, 1872, 19 Gr. 512; *Pell v. Walker*, 1873, 20 Gr. 558; *Hilton v. Woods*, 1867, L.R. 4 Eq. 432.

(*g*) *Seear v. Lawson*, 1880, 15 Ch. D. 426, 434; *Dickinson v. Burrell*, 1866, L.R. 1 Eq. 337.

assignee in good faith without notice of such advance of rent, it was held that the owner of the equity of redemption was entitled to have the amount of rent so advanced applied in payment of the mortgage debt (*h*).

The purchaser of the equity of redemption is, in general, entitled to the benefit of covenants made by the mortgagee with the mortgagor. Thus where a mortgage contained a covenant to release any land sold during the continuation of the mortgage upon the payment of £200 per acre, and an assignee of the mortgagor made a general payment upon the mortgage, and afterwards upon selling a portion, demanded a release from an assignee of the mortgagee, it was held that the benefit of this covenant would pass to an assignee of the equity of redemption, but that the mortgagee must receive the stipulated sum per acre upon the sale of the portion to be released, a general payment on the mortgage not being sufficient (*i*).

A mortgage on five stores expressed to be for \$10,500 contained a provision that the mortgagees would release the easterly store on payment of \$2500, and any one or more of the other four stores on payment of \$2,000 each, at any time on receiving a bonus of three months' interest on the sum so paid, and it was held that the benefit of this clause passed to the assignee of the equity of redemption, and that he was entitled to enforce it (*j*).

A purchaser of the equity of redemption is entitled to the surplus after a sale under the mortgage. So where, after a sale of mortgaged premises in an action for sale, the mortgagor made an assignment for the benefit of creditors before certain prior execution creditors had established their claims in the master's office to the surplus, the assignee was held to

(*h*) *Gilmour v. Roe*, 1874, 21 Gr. 284.

(*i*) *Webber v. O'Neil*, 1864, 16 Gr. 440.

(*j*) *Clark v. Freehold Loan and Savings Co.*, 1888, 16 O.R. 508.

be entitled to such balance free from any liability to satisfy the executions out of it (*k*).

A purchaser of the equity of redemption takes subject to the true state of the accounts as between the mortgagor and the mortgagee, and does not by virtue of the Registry Act stand in any better position than the mortgagor did (*l*).

§133. *Personal liability of mortgagor to mortgagee.*

The transfer of the equity of redemption does not relieve the transferor of his personal liability, if any, to the mortgagee or to the person from whom he acquired the equity, as the case may be.

Nor does the transfer impose upon the transferee any personal liability to the mortgagee or to any person other than the transferor (*m*), even though the transferee covenants with the transferor to pay the mortgage (*n*). Where a mortgagor has become insolvent and his assignees have sold the equity of redemption the purchaser is not bound to make good any deficiency there may be on a sale to realize the security (*o*).

(*k*) *Carter v. Stone*, 1890, 20 O.R. 340.

(*l*) *Thomson v. Stikeman*, 1913, 29 O.L.R. 146, at p. 159, 14 D.L.R. 97, at pp. 107, 108, S.C. 30 O.L.R. 123, 17 D.L.R. 205.

(*m*) *In re Errington, Ex parte Mason*, [1894] 1 Q.B. 11. This is in accordance with the rules that, save as between lessor and lessee, the burden of a covenant does not run with the land at law, and that the burden of a positive covenant does not run with the land in equity. 21 Halsbury, *Laws of England*, p. 270, note (*l*). As to the liability of the transferee to the mortgagee in Alberta, see §134.

(*n*) There is no privity of contract between the transferee and the mortgagee which would enable the latter to sue the former. *Frontenac Loan and Investment Society v. Hyslop*, 1892, 21 O.R. 577; *Canada Landed and National Investment Co. v. Shaver*, 1895, 22 O.R. 377.

(*o*) *Nichols v. Watson*, 1876, 23 Gr. 606.

§134. *Obligation of transferee to indemnify transferor.*

The transfer of the equity may, however, give rise to an obligation on the part of the transferee to indemnify his immediate transferor against the liability, if any, of the latter to the mortgagee or to the person from whom he acquired the equity. The obligation may be express or implied. If a limited obligation to indemnify is expressed in the transfer, a more general obligation cannot be implied (*p*), and there is no implied obligation if the transfer contains a covenant against incumbrances, but in the absence of an express stipulation the general rule is that if land is transferred subject to a mortgage the transferee is under an implied obligation to indemnify the transferor against the latter's liability in respect of the mortgage (*q*). The rule as applied to mortgages of land is only an instance of the principle that if a person buys property which is subject to a charge and it is the intention of the parties that the purchaser is to take the property *cum onere*, the purchaser is bound, irrespectively of the form of the contract, to indemnify the vendor against the charge, for *ex hypothesi* the purchaser is paying only the value of the property less the amount of the charge and he is not entitled to get the property freed from the charge at the vendor's expense (*r*).

In the absence of an express covenant, the implication of

(*p*) *Mills v. United Counties Bank*, [1912] 1 Ch. 231.

(*q*) *Waring v. Ward*, 1802, 7 Ves. 332, at p. 336; *Jones v. Kearney*, 1841, 1 Dr. & W. 134, at p. 155; *Walker v. Dickson*, 1892, 20 O.A.R. 96, at p. 102.

(*r*) *Boyd v. Johnson*, 1890, 19 O.R. 598; *Gooderham v. Moore*, 1899, 31 O.R. 86. The principle has been applied in the case of the transfer of bank shares which are subject to the double liability. *Boulton v. Gzowski*, 1898, 39 Can. S.C.R. 54, 24 O.A.R. 502, 28 O.R. 285. It has been applied also in the case of the purchase of a share in a partnership so as to impose upon the purchaser the obligation to indemnify the vendor against the liabilities of the partnership. *Dodson v. Downey*, [1901] 2 Ch. 620.

an obligation on the purchaser's part to indemnify the vendor arises from the fact of purchase with the intention that the purchaser should pay the charge and not from the terms of the transfer, and the implication may be rebutted by oral evidence shewing that the apparent purchaser was not the purchaser in fact or that it was not the intention of the parties that the purchaser should indemnify the vendor (*s*). Thus there is no implied obligation to indemnify on the part of the grantee in a conveyance which is absolute in form but which is made to him as nominee of the real purchaser or merely as security, the relation of transferor and transferee not being that of vendor and purchaser (*t*).

In *Mills v. United Counties Bank* (*u*), Fletcher Moulton L.J. speaks of "the doctrine . . . that there is an implied covenant on the part of a purchaser of an equity of redemption to indemnify the vendor against the mortgage debt." Farwell L.J., in the judgment which follows, asserts that the obligation belongs to a class of equities independent of contract, which "are now sometimes erroneously called implied contracts." The apparent contradiction between the two learned lords justices may perhaps be mitigated, if not resolved, if we observe that the implied contracts of the common law were themselves introduced because there was no contract in fact. The only real difference between an equity founded in conscience and an implied contract would seem to be that for historical and accidental reasons the courts of common law could not or would not extend to the former

(*s*) As to the admission of oral evidence to rebut the implied obligation, see *Beatty v. Fitzsimmons*, 1893, 23 O.R. 345; *British Canadian Loan Co. v. Tear*, 1893, 23 O.R. 664.

(*t*) *Walker v. Dickson*, 1892, 20 O.A.R. 96; *Corby v. Gray*, 1888, 15 O.R. 1; *Fraser v. Fairbanks*, 1894, 23 Can. S.C.R. 79; *Fullerton v. Brydges*, 1895, 10 M.R. 431; *Campbell v. Douglas*, 1916, 54 Can. S.C.R. 28, 32 D.L.R. 734, affirming 34 O.L.R. 580, 25 D.L.R. 436.

(*u*) [1912] 1 Ch. 231, at p. 241.

class of cases the presumption which they made in the latter (v). It is probably more accurate nevertheless to describe the obligation in question as an equitable obligation (w) and in accordance with this view it has been held that where land is conveyed to a married woman subject to a mortgage she is not bound to indemnify her grantor unless she expressly contracts to do so, that is to say, the obligation to indemnify which is ordinarily implied on the part of a purchaser is not one arising from contract and therefore does not bind the separate estate of a married woman (x).

There is of course no obligation on the part of a purchaser to indemnify the vendor if the latter is himself not liable in respect of the mortgage, for instance, if the vendor had purchased on the terms that he should not assume the mortgage but that it should be paid by the person who sold to him. So it has been held that where a mortgagee sold the land under the power of sale for a price sufficient to pay the principal, interest and costs, he could not without sufficient reason treat the sale as a nullity and have recourse to the former personal liability of the mortgagor, and that if the latter paid the mortgage, not being then personally liable, he could not compel his transferee to indemnify him (y).

If the mortgagor is sued on his covenant by the mortgagee, and is entitled to be indemnified by his transferee, he

(v) 28 L.Q.R. 122-3 (April, 1912)

(w) Cf. *Campbell v. Morrison*, 1897, 24 O.A.R. 224; S.C. *sub nom.* *Maloney v. Campbell*, 28 Can. S.C.R. 228. On the other hand there are dicta in favour of the view that the obligation arises from implied contract in *Beatty v. Fitzsimmons*, 1893, 23 O.R. 245; *Oliver v. McLaughlin*, 1893, 24 O.R. 41.

(x) *McMichael v. Wilkie*, 1891, 18 O.A.R. 464, *Osler J. A.* at pp. 169 ff., *MacLennan J. A.* at pp. 471 ff. If the conveyance to a married woman contains an express covenant on her part to pay the mortgage debt the covenant may be enforced against her separate estate. *Small v. Thompson*, 1897, 28 Can. S.C.R. 219.

(y) *Petterson v. Tanner*, 1892, 22 O.R. 364.

may obtain an order adding the latter as a third party and is entitled to a lien on the land for the amount which he is obliged to pay (z). Payment by the mortgagor is not a condition precedent to his right of action on the purchaser's obligation to indemnify him, and the purchaser may be protected by a direction to pay the money into court (a).

The doctrine now under discussion has in Ontario been expressed in statutory form in the Execution Act which authorizes the sale under a writ of execution of an equity of redemption (b), and provides that if a person other than the mortgagee becomes the purchaser, and

if the mortgagee, his executors, administrators or assigns shall enforce payment of the mortgage debt by the mortgagor the purchaser shall repay the debt and interest to the mortgagor, and in default of payment thereof within one month after demand the mortgagor may recover the debt and interest from the purchaser, and shall have a charge therefor upon the mortgaged land (c)

It is provided by the Manitoba Real Property Act (d) as follows:

97. In every instrument transferring an estate or interest in land under the new system, subject to mortgage or encumbrance, there shall be implied, unless otherwise expressed, the following covenant by the transferee with the transferor, that is to say: that such transferee shall pay the interest, annuity or rent charge secured by such mortgage or encumbrance at the rate and at the time specified in the instrument creating the same, and will indemnify and keep harmless the transferor from and against the principal sum or other moneys secured by such instrument and from and

(z) *Hamilton Provident Loan Co. v. Smith*, 1888, 17 O.R. 1; *McMurtry v. Leushner*, 1912, 3 O.W.N. 1176, 3 D.L.R. 549.

(a) *Mewburn v. Mackelcan*, 1892, 19 O.A.R. 729; *Noble v. Campbell*, 1911, 21 M.R. 597; *In re Richardson*, Ex parte Governors of St. Thomas's Hospital, [1911] 2 K.B. 705; *Shaver v. Sproule*, 1913, 4 O.W.N. 968, 9 D.L.R. 641; cf. *McDonald v. Peuchen*, 1918, 42 O.L.R. 18, 41 D.L.R. 619.

(b) See chapter 16, *Execution Creditors of the Mortgagor*, §154.

(c) R.S.O. 1914, c. 80, s. 33.

(d) R.S.M. 1913, c. 171, s. 97. See *Ross & Phillips v. Schmitz*, 1913, 6 S.L.R. 131, 14 D.L.R. 648, and annotation 14 D.L.R. 652 ff.

against the liability in respect of any of the covenants therein contained or under this Act implied on the part of the transferor.

Under the Land Titles Acts of Saskatchewan, Alberta and the Northwest Territories a similar covenant on the part of the transferee is implied "in every instrument transferring land, for which a certificate of title has been granted, subject to mortgage or encumbrance." The Northwest Territories statute (*e*) does not specify in whose favour the covenant is implied and presumably, as under the Manitoba statute, the covenant is with the immediate transferor only. Under the former Saskatchewan statute (*f*) the covenant was "with the transferor and so long as such transferee shall remain the registered owner with the mortgagee or incumbrancee," and under the Alberta statute (*g*) it is "both with the transferor and the mortgagee." Under the present Saskatchewan statute (*h*) the covenant is "with the transferor."

Under the Alberta statute the mortgagee may sue the transferee upon the covenant (*i*), but in the other provinces the transferor is not liable to the mortgagee unless the covenant or obligation is assigned to the latter (*j*). It was held under the former Saskatchewan statute that the covenant was implied only if the whole of the mortgaged property was transferred (*k*). In Alberta it has been held that the coven-

(*e*) R. S. C. 1906, c. 110, s. 69.

(*f*) R.S.S. 1909, c. 41, s. 73.

(*g*) Alberta statutes, 1906, c. 24, s. 52. By the statute 1916, c. 3, s. 15, the court is authorized to make an order directing the registration of a transfer if the transferee declines to register it.

(*h*) Sask. statutes, 1917 (2nd sess.), c. 18, s. 64.

(*i*) *Great West Lumber Co. v. Murrin & Gray*, 1916, 11 A.L.R. 173, 32 D.L.R. 485.

(*j*) See §135, *infra*.

(*k*) *Montreal Trust Co. v. Boggs*, 1915, 25 D.L.R. 432; *Dominion of Canada Investment and Debenture Co. v. Carstens*, 1917, 10 S.L.R. 272, 36 D.L.R. 25; *Dominion of Canada Investment and Debenture Co. v. Gelhorn*, 1917, 10 S.L.R. 278, 36 D.L.R. 154.

ant is implied only if there is a complete transfer of his interest on the part of the transferor and therefore no covenant is implied in a transfer absolute in form which is intended as security merely (l), and that in any case the implied covenant may be negated by apt words in the transfer (m).

§135. *Mortgagee entitled to enforce indemnity only if it is assigned to him.*

The mortgagor is not bound to enforce the purchaser's obligation to indemnify him for the benefit of the mortgagee, and the position is not changed by the death of the mortgagor. In that event the mortgagee's right is to claim against the estate of the mortgagor. If the mortgagee makes such a claim, but not otherwise, the personal representative of the deceased mortgagor would be obliged, as regards the general body of creditors, to call upon the purchaser to make good the amount by which the assets were diminished by being applied in payment of the mortgage (n). A mortgagee who obtains judgment on the covenant against the mortgagor is not entitled to the appointment of a receiver for the purpose of enforcing the purchaser's obligation to indemnify, even though the plaintiff sues on behalf of himself and all other creditors of the mortgagor (o).

There is no privity of contract or implied obligation between the mortgagee and the purchaser of the equity of redemption which will enable the former to sue the latter for payment of the mortgage money, even though the latter has covenanted with the mortgagor to pay the money (p).

(l) *Short v. Graham*, 1908, 7 W.L.R. 787.

(m) *Bernard v. Faulkner*, 1914, 7 A.L.R. 439, 18 D.L.R. 174.

(n) *Higgins v. Trusts Corporation of Ontario*, 1900, 27 O.A.R. 432.

(o) *Palmer v. McKnight*, 1899, 31 O.R. 306.

(p) *Frontenac Loan and Investment Society v. Hyslop*, 1892, 21 O.R. 577; *Canada Landed and National Investment Co. v. Shaver*,

The right to indemnity may, however, be assigned by the person entitled to it to a person entitled to recover the mortgage debt (*q*), so that if the right is assigned to the mortgagee, he may enforce it (*r*), and, in the case of two successive transfers of the equity of redemption upon the terms that the transferee in each case assumes the mortgage, if the second transferor assigns the right of indemnity to the first transferor, the latter may enforce it against the second transferee (*s*). The measure of the indemnifier's liability is the liability, not the capacity, of the person indemnified to pay (*t*).

The obligation of the purchaser of land subject to a mortgage towards the vendor is essentially only a contract of indemnity, even though the purchaser expressly covenants with the vendor to pay the mortgage, and if the purchaser obtains a release from the only person who could in any way damnify the vendor, he is under no liability. This is illustrated in a striking way by the following case. The equity of redemption was sold by A to B, by B to C, and by C to D, there being in the case of each sale a covenant by the purchaser to pay the mortgage and indemnify his immediate predecessor. The mortgagee, seeking to make D pay the mortgage, procured an assignment from C of D's covenant. Sub-

1895, 22 O.A.R. 377. As to the special statutory provisions in Alberta, see §134.

(*q*) *Maloney v. Campbell*, 1897, 28 Can. S.C.R. 228, affirming *Campbell v. Morrison*, 24 O.A.R. 224. If the assignment is made before any right of action has accrued against the person to be indemnified, the assignment cannot become operative until the accrual of the right of action. S.C. 28 Can. S.C.R. at p. 233.

(*r*) *British Canadian Loan Co. v. Tear*, 1893, 23 O.R. 664; *Morice v. Kernighan*, 1908, 18 M.R. 360.

(*s*) *Smith v. Pears*, 1897, 24 O.A.R. 82.

(*t*) Therefore the fact that the person indemnified is a married woman who has no immediate separate property affords no defence. *British Union and National Insurance Co. v. Rawson*, [1916] 2 Ch. 176

sequently D procured from A and B assignments of the covenants in their favour respectively. It was held (1) that D's covenant, notwithstanding its form, was merely a covenant to indemnify C, (2) that the assignments from A and B released C from any liability to indemnify, A and B being the only persons to whom he could be liable and no cause of action having meantime arisen by C against D, and (3) that consequently D could not be liable to indemnify C. The action by the mortgagee against D was therefore dismissed (u).

§136. *Mortgagee may disable himself from enforcing indemnity.*

If a mortgagee takes an assignment from the mortgagor of the purchaser's covenant to pay the mortgage and indemnify the mortgagor, and so deals with the covenant as to disable himself from restoring it unimpaired to the mortgagor, he cannot sue the mortgagor for payment in so far as the disability exists. A mortgagee, having sold the equity of redemption and taken a covenant from the purchaser to pay the mortgage and indemnify the mortgagor, assigned the covenant to the mortgagee. The purchaser then sold the land in three parcels to three sub-purchasers each of whom assumed and covenanted to pay his proportion of the mortgage debt. The covenants of the sub-purchasers were assigned by the purchaser to the mortgagee who agreed not to make any claim against the purchaser until he had exhausted his remedies against the sub-purchasers and against the lands. The mortgagee having brought an action against the mortgagor for payment, it was held that the extent to which the purchaser's covenant in favor of the mortgagor had been impaired by the mortgagee's agreement with the purchaser could be determined only by the exhaustion of the remedies provided for in the agreement and that in the meantime the mortgagee was not

(u) *Smith v. Pears*, 1897, 24 O.A.R. 82.

entitled to sue the mortgagor for payment (*v*). The mortgagee subsequently exhausted the remedies against the sub-purchasers and against the lands, and obtained from the purchaser a release of the agreement with him, at the same time agreeing not to sue him, but reserving the mortgagor's rights to sue the purchaser in the event of the purchaser's covenant being reassigned by the mortgagee to the mortgagor. The mortgagee then brought a new action against the mortgagor and was held entitled to judgment for the amount owing on the mortgage less the proper sum, if any, to be allowed to the defendant as compensation for the impairment, if any, of the security afforded by the purchaser's covenant owing to the mortgagee's agreement with the purchaser (*w*).

The relations of the mortgagee, the mortgagor and the purchaser who agrees with the mortgagor to assume the mortgage and covenants with the mortgagor to indemnify the latter are not those of creditor, surety and principal debtor respectively. Therefore if the mortgagee makes a binding agreement to give time to the purchaser or otherwise deals with him without the consent of the mortgagor, the mortgagor is not discharged, and may be sued upon the mortgage provided that when he is sued the mortgagee is not then disabled from restoring to the mortgagor the unimpaired property or the unimpaired obligation of the purchaser to indemnify the mortgagor (*x*). If the relations of the parties were really those of creditor, principal debtor and surety, the surety would, of course, be absolutely discharged if, without his consent or without a reservation of rights against him, the cred-

(*v*) *McCuig v. Barber*, 1898, 29 Can. S.C.R. 126, reversing *Barber v. McCuig*, 24 O.A.R. 492.

(*w*) *Barber v. McCuig*, (No. 2), 1900, 31 O.R. 593.

(*x*) *Forster v. Ivey*, 1901, 2 O.L.R. 480. As to the general principle that mortgagee may be disentitled to sue the mortgagor for payment if he has disabled himself from restoring the mortgaged property unimpaired, see chapter 23, *Action on the Covenant*, §227.

itor should make a binding agreement to give time to the principal debtor or impair the security, notwithstanding that the extension of time has expired or the impairment of the security has been made good before the surety is called upon to pay (y).

§137. *Marshalling and subrogation.*

The general rule is that if several parcels belonging to the same person, which are mortgaged to secure a single debt, become severed in title, they must, as between their respective owners, bear the mortgage debt rateably in proportion to their respective values (z), unless by special agreement in the mortgage itself or by declaration on the part of the mortgagor one parcel has been made liable to bear the debt in exoneration of the others (a).

Where however several parcels are mortgaged to secure the same debt, and the mortgagor afterwards conveys or mortgages to different persons, giving to each a covenant against incumbrances, then as between the purchasers or mortgagees

(y) It is an essential feature of a true contract of suretyship that there should be in existence or contemplation an original or principal liability to which the liability of the surety is collateral. *Lakeman v. Mountstephen*, 1874, L.R. 7 H.L. 17; *Petrie v. Hunter*, 1884, 10 O.A.R. 127; *Simpson v. Dolan*, 1908, 16 O.L.R. 459. It is, however, a perversion of language to say that the liability of a mortgagor to the mortgagee is collateral to the liability of the purchaser of the mortgaged property. The principal liability is that of the mortgagor and the liability of the purchaser, if any, to the mortgagee is collateral to and based upon the liability of the mortgagor. *Cf. Trust & Loan Co. v. McKenzie*, 1896, 23 O.A.R. 167, at p. 170.

(z) *Ker v. Ker*, 1869, 4 I.R. Eq. 15, 25; *In re Darby's Estate*, *Rendall v. Darby*, [1907] 2 Ch. 465; *Flint v. Howard*, [1893] 2 Ch. 54.

(a) *Marquis of Bute v. Cunynghame*, 1826, 2 Russ. 275, 299; *Leonino v. Leonino*, 1879, 10 Ch. D. 460, 465; *In re Dunlop*, *Dunlop v. Dunlop*, 1882, 21 Ch. D. 583, 588. As to the general rule and the application of the doctrine of marshalling, see 21 Halsbury, *Laws of England*, pp. 303-307.

the parcels are liable for the mortgage debt in succession, beginning with the property last sold (b).

The mortgagee or purchaser of one of the two parcels may be entitled to have the securities marshalled in order that effect may be given to his rights (c).

The doctrine of marshalling has been stated thus:—A mortgagee or other creditor having two funds to which he may resort shall not disappoint another creditor who can resort only to one of those funds; in such a case the court will marshal the funds, without regard to the interests of the debtor, so as to satisfy the claim of the creditor having both funds out of that fund which will leave a fund for the other creditors (d).

In *Webb v. Smith* (e) Cotton, L.J. states the doctrine thus:—

"If A. has a charge upon Whiteacre and Blackacre, and if B. also has a charge upon Blackacre only, A. must take payment of his charge out of Whiteacre, and must leave Blackacre, so that B., the other creditor, may follow it and obtain payment of his debt out of it: in other words, if two estates, Whiteacre and Blackacre, are mortgaged to one person, and subsequently one of them, Blackacre, is mortgaged to another person, unless Blackacre is sufficient to pay both charges, the first mortgagee will be compelled to take satisfaction out of Whiteacre, in order to leave the second mortgagee Blackacre, upon which alone he can go. There was also another class of cases in which the doctrine was applied, namely, where under the old law the creditors by simple contract had no claim upon real assets, unless charged with or devised for the payment of debts, a court of equity would compel specialty creditors who might resort in the first instance to the personal estate, in priority of creditors by simple contract, and to the real assets, in exclusion of them,

(b) *Jones v. Beck*, 1871, 18 Gr. 671; see also *Renwick v. Berryman*, 1886, 3 M.R. 387; *In re Jones, Farrington v. Forrester*, [1893] 2 Ch. 461. See also §139, *infra*.

(c) See §§138 and 139, *infra*.

(d) *Aldrich v. Cooper*, *Durham v. Lankester*, *Durham v. Armstrong*, 1802, 18 R.C. 198; S.C. 18 Ves. 382, 1 W. & T.L.C. 24. 35.

(e) 1885, 30 Ch.D. 192, at p. 200.

to recover satisfaction in the first place out of the real assets as far as they went" (f).

The singly-secured creditor cannot interfere with the right of the doubly-secured creditor to resort to any or either of the properties upon which he has security, but if the doubly-secured creditor realizes his claim out of the property upon which alone the single-secured creditor has a charge and thus renders such property unavailable to the latter, the latter is entitled to be subrogated to the place of the former against the property upon which originally the latter had no charge (g).

§138. *Case of transfer of one of two parcels subject to a common mortgage.*

The simplest case of marshalling (h) is that of a first mortgage of two parcels to A and a second mortgage of one of the two parcels to B. If the first mortgagee realizes his claim out of the parcel which is also subject to the second mortgage the second mortgagee is entitled to a charge on the other parcel in the place of the first mortgagee so as to indemnify himself for the security which has been rendered unavailable by the action of the first mortgagee. It is immaterial whether the second mortgagee, when he took the mortgage, had or had not notice of the existence of the first mortgage (i).

The doctrine of marshalling may apply in favour of the purchaser or mortgagee of one of two parcels which are subject to mortgage for one debt against the person who owned the two parcels prior to the conveyance or mortgage of one

(f) See also *Dolphin v. Aylward*, 1870, L.R. 4 H.L. 486.

(g) *Noyes v. Pollock*, 1886, 32 Ch.D. 53, 70; *Manks v. Whiteley*, [1911] 2 Ch. 448, at p. 466, S.C. reversed on other grounds, [1912] 1 Ch. 735, restored *sub nom.* *Whiteley v. Delaney*, [1914] A.C. 132.

(h) See §137, *supra*.

(i) *Hughes v. Williams*, 1852, 3 Mac. & G. 683, 690.

parcel or against persons claiming under him otherwise than by conveyance or mortgage (*j*). If the owner of both parcels himself created the mortgage on them and conveys or mortgages one of the parcels without any reference to the existing mortgage (*k*) and *a fortiori* if he conveys or mortgages with a covenant against encumbrances (*l*), he is obliged to indemnify his grantee or mortgagee against the existing mortgage (*m*). If, however, the owner of the two parcels was not the creator of the mortgage on them, but such mortgage is paramount to his title, and he conveys or mortgages one of the parcels, without indicating an intention to exonerate such parcel, then as between him and the grantee or mortgagee of one parcel there is a mutual right to compel contribution for the purpose of paying off the paramount mortgage (*n*).

§139. *Case of transfer to different persons of two parcels subject to common mortgage.*

The case is more complicated if two parcels are subject to a mortgage to secure one debt and subsequently one parcel is conveyed or mortgaged to one person and the other is conveyed or mortgaged to another person. The question of the relative liabilities of the parties with regard to the common mortgage is no longer one merely between the former owner of the equity of redemption in the two parcels and the mort-

(*j*) That is, against the owner's trustee in bankruptcy, his judgment creditors, his personal representative and against his wife who charged her own property for the prior debt. 21 Halsbury. Laws of England, p. 305.

(*k*) In re Repington, Wodehouse v. Scobell, [1904] 1 Ch. 811.

(*l*) In re Jones, Farrington v. Forrester, [1893] 2 Ch. 461.

(*m*) In re Darby's Estate, Rendall v. Darby, [1907] 2 Ch. 465.

(*n*) Ker v. Ker, 1869, 4 L. R. Eq. 15; In re Darby's Estate, *supra*.

gagee or grantee of one of the parcels (*o*), but in addition the conflicting interests of the grantees or mortgagees of the respective parcels come into question.

It has been broadly stated that the "right of a subsequent mortgagee of one of the estates to marshall—that is, to throw the prior charge on both estates upon that which is not mortgaged to him—is an equity which is not enforced against third parties, that is, against any one except the mortgagor and his legal representatives claiming as volunteers under him. It is not enforced against a mortgagee or purchaser of the other estate. If both estates are subject to the separate second mortgages the Court apportions the first mortgage between them" (*p*). This opinion was, however, expressed in a case in which the second mortgage on the first parcel was expressed to be subject to the first mortgage, and is correct if qualified by reference to that fact. The second mortgage on the second parcel was also expressed to be subject to the first mortgage, and it was correctly decided, on an appeal by the holder of this second mortgage from a judgment that the first mortgage debt should be apportioned, that the judgment ought to be affirmed. The rule is that if parcels subject to a common charge are conveyed or mortgaged in succession either expressly subject to encumbrances or without anything to indicate that those first sold are to be exonerated, the common charge should, as between the grantees or mortgagees of the different parcels, be apportioned rateably among the parcels, whether the later conveyance or mortgage is for value or is voluntary (*q*), or is taken with or without notice of the earlier conveyance or mortgage (*r*).

(*o*) As in §138, *supra*.

(*p*) *Flint v. Howard*, [1893] 2 Ch. 54, Kay, L.J. at p. 73; cf. *Webb v. Smith*, 1885, 30 Ch.D. 192, 202; *The Chiochia*, [1898] P. 1, 6.

(*q*) *Dolphin v. Aylward*, 1870, L.R. 4 H.L. 486, 501.

(*r*) *Flint v. Howard*, [1893] 2 Ch. 54, 73.

If, on the other hand, the second mortgage or the conveyance of the first parcel contains a covenant against encumbrances or a declaration that there are no encumbrances or a covenant for further assurance (*s*), the mortgagee or grantee is entitled to have the securities marshalled so as to throw the whole of the first mortgage debt on the other parcel as against the subsequent purchaser or mortgagee of the latter parcel who does not take the legal estate for value and without notice (*t*). The result is similar if two parcels are mortgaged to A, then one to B and the other to C, and C's mortgage is expressed to be subject to and after payment of both the earlier mortgages (*u*).

(*s*) In the case of a voluntary settlement a covenant for further assurance would not be sufficient. *Ker v. Ker*, 1869, 4 I.R. Eq. 15.

(*t*) In *re Jones*, *Farrington v. Forrester*, [1893] 2 Ch. 461, 472; *Jones v. Beck*, 1871, 18 Gr. 671; *Clark v. Bogart*, 1880, 27 Gr. 450; *Pierce v. Canavan*, 1882, 7 O.A.R. 187; *McCarthy v. McCartie* (No. 2), [1904] 1 I.R. 100, 115; *Tighe v. Dolphin*, [1906] 1 I.R. 305.

(*u*) In *re Mower's Trusts*, 1869, L.R. 8 Eq. 110.

CHAPTER XV.

LESSEE OF MORTGAGED LAND.

§141. Distinction between leases before and after mortgage.
p. 249.

§142. Lease by owner prior to mortgage, p. 250.

§143. Lease by mortgagor subsequent to mortgage, p. 254.

§144. Statutory or contractual power to lease, p. 257.

§141. *Distinction between leases before and after mortgage.*

If the owner of land free from encumbrance grants a lease thereof, and afterwards mortgages it, the mortgage affects merely the reversion retained by the mortgagor. The right of the lessee to possession in such case is paramount and the rights of the mortgagee to possession or to have recourse to the land for recovery of the mortgage money are subject to the right of the lessee. A legal mortgagee becomes, however, the owner of the reversion subject to the mortgagor's right to redeem and when the mortgagee becomes entitled to possession as against the mortgagor he may compel the tenant to pay rent to him instead of the mortgagor (*a*).

On the other hand, if the owner of land mortgages it and thereafter, without the authority of the mortgagee, purports to grant a lease of it, the lease is a partial transfer of the equity of redemption merely. The mortgagee's rights are paramount and the tenant's right to possession is subject to the mortgagee's rights to take possession and to have recourse

(*a*) See §142, *infra*. It is assumed in this chapter that the mortgagee takes the mortgage with notice of the prior lease, either by virtue of the registration of the lease or otherwise, or that the lease is one which does not require to be registered and the lessee is in possession. See chapter 8, *The Registry Act*, §72, and chapter 10, *The Land Titles Acts*, §94.

to the land for recovery of the mortgage money. There is no direct relation between the mortgagee and the tenant in such case, as there is in the case of a mortgage being made when the land has already been leased, and unless there is in effect a new tenancy agreed upon between the mortgagee and the tenant, the former is not entitled to compel the latter to pay rent to him. The mortgagee's remedy, if he is entitled to possession, is to eject the tenant (*b*).

§142. *Lease by owner prior to mortgage.*

If a mortgage is made of land of which the owner has already granted a lease, the mortgagee takes subject to the lease (*c*), and can obtain possession only upon the termination of the lease (*d*). The effect of the mortgage, if it is a legal mortgage, is to convey the reversion to the mortgagee (*e*) and no attornment on the part of the tenant is necessary in order to create the relation of landlord and tenant, but the tenant may make valid payments of rent to the mortgagor until the mortgagee becomes entitled to possession as between mortgagor and mortgagee (*f*) and gives notice to the tenant requiring payment of the rent to him (*g*). It is provided in

(*b*) See §143, *infra*. It is assumed that the mortgage is registered prior to the making of the lease or that the lessee takes with actual notice of the mortgage. See chapter 8, *The Registry Act*, §§72, 74, and chapter 10, *The Land Titles Acts*, §§94, 95.

(*c*) See §141, *supra*.

(*d*) That is, upon the termination of the lease by lapse of time or after such notice to quit given by the mortgagee as is sufficient according to the terms of the lease. Cf. *Canada Permanent Building and Savings Society v. Rowell*, 1860, 19 U.C.R. 124.

(*e*) *Rogers v. Humphreys*, 1835, 4 A. & E. 299.

(*f*) See chapter 22, *Action for Possession*, §212, as to the right to possession as between the mortgagor and the mortgagee.

(*g*) *Moss v. Gallimore*, 1779, Doug. 279, at p. 282, 18 R.C. 403, at p. 407. As to the whole subject matter of this chapter, see the notes to this case in 1 *Smith's Leading Cases*, 12th ed., pp. 585 ff.

Ontario by the Landlord and Tenant Act, R.S.O. 1914, c. 155, s. 61, as follows (h):

61.—(1) Every grant or conveyance of any rent or of the reversion or remainder of any land shall be good and effectual without any attornment of the tenant of the land out of which such rent issues, or of the particular tenant upon whose particular estate any such reversion or remainder is contingent or depending.

(2) A tenant shall not be prejudiced or damaged by the payment of rent to any grantor or by breach of any condition for non-payment of rent before notice to him of such grant by the grantee.

The statute will not protect a tenant who pays rent before it is due if before the due date the mortgagee gives him notice (i).

After the mortgagee becomes entitled to possession and gives notice to the tenant requiring payment of the rent, he has the ordinary rights of a landlord to sue or distrain for rent. The same principles apply in the case of a lease made subsequently to the mortgage by the authority of the mortgagee (j). When the mortgagee requires the rent to be paid to him he will thereafter be liable in equity as a mortgagee in possession (k).

The mortgagee who gives notice to the tenant requiring payment of rent is entitled to the rent which thereafter becomes payable, as well as any rent which has become payable since the time when the mortgagee became entitled to possession and which is in fact unpaid at the time of the notice, even though a portion of such rent is payable in respect of the period before the mortgagee becomes entitled to possession.

(h) Re-enacting in substance 4 and 5 Anne, c. 3 (or c. 16, in Ruffhead's edition), ss. 9, 10.

(i) *DeNicholls v. Saunders*, 1870, L.R. 5 C.P. 589; *Cook v. Guerra*, 1872, L.R. 7 C.P. 132.

(j) *In re Ind. Coope & Co.*, [1911] 2 Ch. 223.

(k) See chapter 28, *Mortgagee in Possession*, §301.

sion (*l*). The mortgagee is not, however, entitled to rent which became payable before he was entitled to possession unless such rent is expressly assigned to him (*m*) and even in that case, though he may sue for such assigned arrears of rent, he cannot distrain for them, as he can in the case of rent which falls due after he is entitled to possession (*n*).

In the application of English cases it is to be observed that a proviso for quiet enjoyment until default is not usually inserted in a mortgage in England (*o*). In the absence of such proviso or other reservation to the mortgagor of the right to possession, a legal mortgagee may enter into possession whenever he thinks fit so to do so far as the mortgagor is concerned (*p*), and if there is a tenant in possession under a paramount lease, the mortgagee may at any time give notice to the tenant requiring payment of the rent to him instead of the mortgagor, and the mortgagee thereupon becomes entitled to any rent in arrear which has become payable since the making of the mortgage. In Ontario it is customary to insert in a mortgage a proviso for quiet enjoyment until default, which operates as a redemise to the mortgagor and constitutes him a tenant of the mortgagee until default (*q*). Consequently, in the case of a mortgage containing such a proviso, the mortgagee is not entitled until default to require payment of the rent, and when he does become so entitled and gives notice to the tenant, he is entitled only to the ar-

(*l*) *Moss v. Gallimore*, 1779, Doug. 279, 18 R.C. 403; *Rogers v. Humphreys*, *supra*. The statement in the text is subject to qualification in Ontario in view of the provisions of the Apportionment Act, referred to below.

(*m*) *Salmon v. Dean*, 1851, 3 Mac. & G. 344.

(*n*) *Flight v. Bentley*, 1835, 7 Sim. 149; *Brown v. Metropolitan Counties, etc., Society*, 1859, 1 E. & E. 832.

(*o*) 18 R. C. at p. 469.

(*p*) See chapter 22, *Action for Possession*, §212.

(*q*) See chapter 22, *Action for Possession*, §214.

rears of rent which have become payable since default, and not to those which became payable in the interval between the making of the mortgage and the occurrence of default.

The question whether a mortgagee who gives notice to the tenant is entitled to rent accruing due in respect of the period prior to the giving of the notice may also be affected in Ontario by the Apportionment Act, R.S.O. 1914, c. 156, s. 4, which provides as follows (r):

4. All rents, annuities, dividends and other periodical payments in the nature of income, whether reserved or made payable under an instrument in writing or otherwise, shall, like interest or money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly.

Under this provision it would appear that a mortgagee, after giving notice to a tenant requiring payment of rent, is entitled only to rent which, upon being apportioned, is payable in respect of the period since he became entitled to possession, that is, since the making of the mortgage in the absence of a proviso for quiet enjoyment until default, and since default if there is such a proviso, and which either has become payable since the giving of the notice or though payable before is in fact unpaid when the notice is given (s).

If a tenant after notice from the mortgagee voluntarily pays to the mortgagor rent which he is afterwards compelled to pay over again to the mortgagee, he cannot recover it back from the mortgagor (t).

As an equitable mortgage does not convey the legal estate (u), the general rule is that an equitable mortgagee is not entitled to bring an action for possession against the mortgagor in occupation of the mortgaged lands (v) or, apart

(r) Following the English statute 33 & 34 V. c. 35, s. 2.

(s) See *Kinnear v. Aspdon*, 1892, 19 O.A.R. 468., for a discussion of the general principle of the Apportionment Act.

(t) *Higgs v. Scott*, 1849, 7 C.B. 63.

(u) See chapter 5, *Equitable Mortgages*, §41.

(v) See chapter 22, *Action for Possession*, §212, where the excep-

from express contract between the mortgagor and the equitable mortgagee, to require payment of rent by tenants in occupation. The equitable equivalent to the taking of possession is the appointment by the court of a receiver of the rents and profits (*w*).

In the absence of express contract between the mortgagor and the equitable mortgagee entitling the latter to take possession with the consequential right to take the rents, if the equitable mortgagee gives notice to a tenant requiring payment of the rent, the tenant may refuse payment because he would get no discharge from the mortgagee, and notwithstanding the notice he may still pay the mortgagor and get a good discharge (*x*). If, however, the tenant voluntarily pays rent to an equitable mortgagee who claims the rent in that capacity, the tenant is not entitled to recover it back (*y*).

A mortgagor who is entitled to possession or to receipt of the rents and profits of land subject to a lease, and whose mortgagee has neither taken possession nor given notice of his intention to take possession, has the right to sue the tenant for damages for breach of a covenant to repair contained in the lease (*z*).

§143. *Lease by mortgagor subsequent to mortgage.*

If the owner of land mortgages it and thereafter leases it to a tenant, the lease is binding upon the tenant, who is not permitted

to sue the mortgagor for damages for breach of a covenant to repair in the case of a mortgage which conveys the equity of redemption is mentioned.

(*w*) See chapter 32, *Appointment of Receiver*, §351.

(*x*) *Vacuum Oil Co. v. Ellis*, [1914] 1 K.B. 693.

(*y*) *Finck v. Tranter*, [1905] 1 K.B. 427.

(*z*) R.S.O. 1914, c. 155, s. 5 (Landlord and Tenant Act), adopting the English Conveyancing Act, 1881, s. 10; *Turner v. Walsh* [1909] 2 K.B. 181.

(*a*) See §141, *supra*, for a brief comparison between this case

to dispute his landlord's title, and so long as the mortgagee does not interfere with the tenant's possession, the mortgagor may receive the rent and may distrain for it (*b*). The lease is also binding by estoppel upon the mortgagor and all persons claiming under him except the mortgagee, and gives to the tenant a sufficient interest in the equity of redemption to entitle him to redeem the mortgage (*bb*).

A lease made after the land has been mortgaged, unless it is made by the authority of the mortgagee or pursuant to a power to lease contained in the mortgage (*c*), is not at common law binding upon the mortgagee. The mortgagee, so soon as he becomes entitled to possession under the mortgage, may without notice eject a tenant who has been let into possession under the lease (*d*). If, however, the mortgagee after he is entitled to possession ejects a tenant, he will be liable in equity to account as a mortgagee in possession (*e*).

The mortgagee cannot merely by giving notice to the tenant create the relation of landlord and tenant between them or entitle himself to sue or distrain for rent due or thereafter accruing due. If the tenant refuses to pay rent to the mort-

and the case of the owner leasing his land and thereafter mortgaging it

(*b*) *Trent v. Hunt*, 1853, 9 Ex. 14; *Carpenter v. Parker*, 1857, 3 C.B. N.S. 206; *Wilton v. Dunn*, 1851, 17 Q.B. 294. The mortgagor is not entitled to distrain after the appointment of a receiver. *Woolston v. Ross*, [1900] 1 Ch. 788.

(*bb*) *Tarn v. Turner*, 1888, 39 Ch.D. 456; *Martin v. Miles*, 1883, 5 O.R. 404; see chapter 24, *Action for Foreclosure*, §234.

(*c*) In England a mortgagor or mortgagee in possession has by statute, subject to the terms of the mortgage, certain powers as to making leases. See §144. As to a lease made by the mortgagee as agent for the mortgagor, see *Chapman v. Smith*, [1907] 2 Ch. 97.

(*d*) *Keech v. Hall*, 1778, Dougl. 21, 18 R.C. 123; *Gibbs v. Cruickshank*, 1873, L.R. 8 C.P. 454.

(*e*) See chapter 28, *Mortgagee in Possession*, §301.

gaged no tenancy is created and the mortgagee's remedy is an action for possession (*f*).

The mortgagee, when he is entitled to possession, may, however, bring an action against the tenant not only for possession but also for trespass and mesne profits, and in respect of the latter causes of action may recover an amount equivalent to the rent, if any, which has become payable since he became entitled to possession (*g*) and which is in fact unpaid at the time of the service of the notice. The tenant would be justified in paying, on demand but without action, out of the rent owing by him such amount as the mortgagee would be entitled to recover (*h*).

On the other hand a new tenancy between the mortgagee and the tenant may be created by express agreement between them or may be implied from their conduct. Giving the tenant notice to quit, or demanding or receiving or distraining for the rent may be conduct on the mortgagee's part sufficient to amount to a recognition of the mortgagor's tenant as his own tenant (*i*), but there is no new tenancy created if the tenant refuses to pay rent after demand, and the mere fact that the tenant remains in possession after demand is not

(*f*) *Towerson v. Jackson*, [1891] 2 Q.B. 484; *Evans v. Elliott* 1828, 9 A. & E. 342.

(*g*) See §142, *supra*, where it is pointed out that in England it is not customary, as it is in Ontario, to insert in a mortgage a proviso for quiet enjoyment until default, so that the mortgagee becomes entitled to possession upon the making of the mortgage.

(*h*) *Pope v. Biggs*, 1829, 9 B. & C. 245; *Rusden v. Pope*, 1868, L.R. 3 Ex. 269, at p. 275; *Barnett v. Guildford (Earl)*, 1855, 11 Ex. 19; *Ocean Accident and Guarantee Corporation v. Ilford Gas Co.*, [1905] 2 K.B. 493. It would appear however that in view of the Apportionment Act, referred to in §142, the mortgagee would not be entitled to recover the equivalent of rent accruing due in respect of the period prior to his becoming entitled to possession, although payable subsequently.

(*i*) *Doe v. Cadwallar*, 1821, 2 B. & Ad. 472; *Doe v. Hales* 1831, 7 Bing. 322; *Smith v. Eggington*, 1874, L.R. 9 C.P. 145.

sufficient evidence of a new tenancy (*j*). If, however, the tenant pays rent to the mortgagee pursuant to a notice from the mortgagee, a new tenancy from year to year is created in the absence of evidence of a contrary intention (*k*), but it does not follow that the tenant holds upon the terms of the old lease so far as they are applicable to a tenancy from year to year, the terms of the new tenancy being a matter of evidence or inference from what is done by the parties (*l*).

§144. *Statutory or contractual power to lease.*

After the making of a mortgage the concurrence of both the mortgagor and the mortgagee is necessary for a valid lease unless either party is empowered by statute or by the terms of the mortgage (*m*).

Under a mortgage made pursuant to the Short Forms of Mortgages Act (*n*) containing a covenant in the form of schedule B, clause 7, of that act, that on default the mortgagee shall have quiet possession of the lands, a mortgagee may on default, without giving notice, take possession and make any lease that

(*j*) *Towerson v. Jackson*, *supra*; cf. *Brock v. Forster*, 1897, 34 N.B.R. 262; *Underhay v. Read*, 1887, 20 Q.B.D. 209.

(*k*) *Doe v. Bucknell*, 1838, 8 C. & P. 566; *Corbett v. Plowden*, 1884, 25 Ch.D. 678.

(*l*) *Keith v. R. Gancia & Co.*, [1904] 1 Ch. 774, at p. 783.

(*m*) *Williams*, *Real Property*, 21st ed., pp. 561, 555. In England by the Conveyancing Act, 1881, 44 & 45 V. c. 41, either a mortgagor or a mortgagee in possession may make valid leases binding upon the other subject to certain limitations specified in the statute. *Willson v. Queen's Club*, [1891] 3 Ch. 522; *Brown v. Peto*, [1900] 2 Q.B. 653; *King v. Bird*, [1909] 1 K.B. 837; *Public Trustee v. Lawrence*, [1912] 1 Ch. 789. By the Conveyancing Act, 1911, a mortgagor or a mortgagee in possession has limited powers of accepting surrenders of leases for the purpose of enabling him to grant other leases authorized by the statute.

(*n*) See chapter 35, *Short Forms of Mortgages Act*, §383. The short form of covenant and the corresponding extended form are set out in chapter 22, *Action for Possession*, §214.

will not interfere with the mortgagor's right to redeem (*o*). There is nothing in this covenant repugnant to the proviso contained in schedule B, clause 14, of the act, that the mortgagee on default of payment may, after giving notice, enter on and lease or sell the lands. The act contemplated in the proviso is not the mere taking possession in order to keep down the interest, which may be done immediately on default and without notice, but the entering on the lands to lease or sell in such wise that the mortgagor's right to redeem will be postponed or destroyed (*p*).

The Real Property Act of Manitoba and the Land Titles Acts of Saskatchewan and Alberta contain provisions enabling a mortgagee to make leases after default subject to the conditions mentioned in the statutes (*q*).

(*o*) *Brethour v. Brooke*, 1893, 23 O.R. 658, 21 O.A.R. 144.

(*p*) *Brethour v. Brooke*, *supra*; *Doe dem. Garrod v. Olley*, 1840, 12 A. & E. 481; *Lows v. Telford*, 1876, 1 App. Cas. 414.

(*q*) See chapter 22, *Action for Possession*, §217, where these provisions are more fully referred to.

CHAPTER XVI.

EXECUTION CREDITORS OF THE MORTGAGOR.

- §151. Rights of execution creditors, p. 259.
- §152. Seizure and sale of equity of redemption, p. 261.
- §153. Effect of seizure, sale and conveyance by sheriff, p. 263.
- §154. Who may purchase at sheriff's sale, p. 264.

§151. *Rights of execution creditors.*

The question of priority under the Registry Act (*a*) and under the Land Titles Acts (*b*) as between an execution creditor and a mortgagee or purchaser of the land has already been discussed. Questions of limitation of actions or proceedings will be discussed later (*c*). In other respects the rights and remedies of an execution creditor of the mortgagor are discussed in the present chapter.

Prior to 1849 in Upper Canada an equity of redemption could not be sold under execution (*d*). In that year the statute 12 V. c. 73 was passed, authorizing the seizure, sale and conveyance of the interest of the mortgagor in mortgaged lands and tenements under a writ of execution against the lands and tenements of the mortgagor (*e*). Under this statute it was held that the equity of redemption could not be sold after the death of the mortgagor under an execution against the lands and tenements of the mortgagor (*f*). Consequently

(*a*) See chapter 8, *The Registry Act*, §76.

(*b*) See chapter 10, *The Land Titles Acts*, §96.

(*c*) See chapter 26, *Limitation of Actions*, §264.

(*d*) *Simpson v. Smyth*, 1846, 1 U.C.E. & A. 9. See chapter 5, *Law and Equity in Upper Canada*, §32.

(*e*) C.S.U.C. 1859, c. 22, s. 257 (Common Law Procedure Act). See now s. 31, sub-s. (1), of the Execution Act, in §152, *infra*.

(*f*) *Bank of Upper Canada v. Brough*, 1862, 2 U.C.E. & A. 95; *Lowell v. Bank of Upper Canada*, 1863, 10 Gr. 57.

in 1863 the statute 27 V. c. 13 was passed, authorizing the sale of the equity of redemption in a freehold mortgage of real estate under an execution against the lands and tenements of the owner of the equity of redemption either in his lifetime or in the hands of his executors or administrators after his death (*g*).

Under the last mentioned statute it was held that a valid sale could not be made where there were two mortgages held by different persons upon the same property (*h*). This decision was doubted in a later case (*i*), and the question whether an equity of redemption subject to two or more mortgages could be sold under an execution remained doubtful (*j*) until 1915, when the statute 5 G. 5, c. 20, s. 10, was passed, authorizing the sale under an execution of the equity of redemption where there are more mortgages than one in the same manner as in the case of land subject to one mortgage only (*k*).

If the equity of redemption cannot be sold under a writ of execution, a receiver may be appointed by way of equitable execution at the instance of a judgment creditor (*l*).

Execution creditors of the mortgagor are "assigns" and are entitled to notice of sale under a power of sale the terms of which require notice to be given to assigns of the mortgagor (*m*). They are encumbrancers upon the interest of the mort-

(*g*) See now s. 31, sub-s. (2), of the Execution Act, in §152, *infra*.

(*h*) *Donovan v. Bacon*, 1869, 16 Gr. 472, note; *Wood v. Wood*, 1869, 16 Gr. 471.

(*i*) *Samis v. Ireland*, 1879, 4 O.A.R. 118.

(*j*) *Glover v. Southern Loan and Savings Co.*, 1901, 1 O.L.R. 59; *Canadian Mining and Investment Co. v. Wheeler*, 1902, 3 O.L.R. 210.

(*k*) See s. 31, sub-s. (3), of the Execution Act, in §152, *infra*.

(*l*) *Donovan v. Bacon*, 1869, 16 Gr. 472, note; *Kerr v. Styles*, 1879, 26 Gr. 309; *Canadian Bank of Commerce v. Rolston*, 1902, 4 O.L.R. 106.

(*m*) *Re Abbott and Medcalf*, 1891, 20 O.R. 299. See chapter 31, *Sale under Power of Sale*, §339.

gagor and upon the proceeds in case of sale, and are entitled to payment thereout according to priority, and it has been held that if a mortgagee sells the land and pays off an encumbrancer who holds, to his knowledge, collateral security, the mortgagee must take over the collateral security for the benefit of subsequent encumbrancers, including execution creditors, and is liable to them for the value thereof if he fails to do so (o).

A mortgagee who pays off a prior execution has a lien in respect of the amount paid as against subsequent execution creditors (p).

§152. *Seizure and sale of equity of redemption.*

It is provided in Ontario by the Execution Act, R.S.O. 1914, c. 80, ss. 30 and 31, as follows (q):

30. Where the word "mortgagor" occurs in the next succeeding three sections it shall be read and construed as if the words "his heirs, executors, administrators or assigns, or person having the equity of redemption," were inserted immediately after the word "mortgagor."

31.—(1) The sheriff to whom an execution against the lands and tenements of a mortgagor is directed may seize, sell and convey all the interest of the mortgagor in any mortgaged lands and tenements.

(2) The equity of redemption in freehold land shall be saleable under an execution against the lands and tenements of the owner of the equity of redemption in his lifetime, or in the hands of his executors or administrators after his death, subject to the mortgage, in the same manner as lands and tenements may now be sold under an execution.

(3) Where more mortgages than one of the same lands have been made to the same mortgagee or to different mortgagees, subsections 1 and 2 shall apply, and the equity of redemption shall be

(o) *Glover v. Southern Loan and Savings Co.*, 1901, 1 O.L.R. 59.

(p) *Trust and Loan Co. v. Cuthbert*, 1868, 14 Gr. 410.

(q) "Sheriff" is defined by s. 2 as including any officer to whom an execution is directed. As to the genesis of these provisions, see §151, *supra*.

saleable under an execution against the lands and tenements of the owner, subject to the mortgages, in the same manner as in the case of land subject to one mortgage only (*r*).

A sale of one of several lots included in a mortgage is unauthorized. The sheriff cannot sever the equity of redemption; he may only sell the equity in all the lands comprised in the mortgage, and where the lands are in different counties the act does not apply (*s*).

So where four persons joined in executing a mortgage of their joint estate, and subsequently the interests of three of them were sold under executions, it was held that the sale was inoperative and that the owner of the equity of redemption had a right to redeem; and it was further held that the purchaser at the sheriff's sale, who was also the mortgagee, having gone into possession of the mortgaged estate, was bound to account for the rents and profits (*t*).

The equity of redemption in one parcel of land and the fee in another parcel may be sold together under a writ of execution, but a sale under two executions only one of which binds the debtor's lands, is invalid (*u*).

Where the execution was against three debtors jointly, each of whom had made a mortgage on lands which belonged to himself solely, and the sheriff sold the equity of redemption of all the debtors in the lands, the sale was upheld (*v*).

The widow of a mortgagor who has a right to dower which has not been assigned, although she is entitled to redeem a mortgage to which her dower is subject, is not possessed of an estate in the land, and therefore is not an "assign" of her

(*r*) Sub-s. 3 was added in 1915 by the statute 5 G. 5, c. 20, s. 10.

(*s*) *Heward v. Wolfenden*, 1868, 14 Gr. 188; *Vannorman v. McCarty*, 1869, 20 U.C.C.P. 42.

(*t*) *Cronn v. Chamberlin*, 1880, 27 Gr. 551.

(*u*) *Samis v. Ireland*, 1879, 4 O.A.R. 118.

(*v*) *Rathbun v. Culbertson*, 1875, 22 Gr. 465.

husband or a "person having the equity of redemption" within the meaning of s. 30 of the statute, and her interest is not saleable under an execution against the mortgagor (*w*). The result is the same if she is assumed to elect in favour of the undivided third share of the equity of redemption under the Devolution of Estates Act, for in that event she becomes tenant in common of the equity of redemption with her children, and it is settled that the interest of one of several tenants in common cannot be sold by the sheriff under an execution (*x*).

The statute does not apply if the right to redeem does not appear upon the face of the deed, as, for example, where the land has been conveyed by a deed which is absolute in form but which is alleged to be a mortgage in reality (*y*).

The equity of redemption in a term of years is not within the statute and cannot be sold under an execution (*z*).

§153. *Effect of seizure, sale and conveyance by sheriff.*

It is further provided in Ontario by the Execution Act, R.S.O. 1914, c. 80, s. 32, as follows:

32. The effect of the seizure or taking in execution, sale and conveyance of mortgaged lands and tenements shall be to vest in the purchaser, his heirs and assigns, all the interest of the mortgagor therein at the time the execution was placed in the hands of the sheriff, as well as at the time of the sale, and to vest in the purchaser, his heirs and assigns, the same rights as the mortgagor would have had if the sale had not taken place; and the purchaser, his heirs or assigns, may pay, remove or satisfy any mortgage, charge or lien which at the time of the sale existed upon the lands:

(*w*) *Canadian Bank of Commerce v. Rolston*, 1902, 4 O.L.R. 100.

(*x*) *Canadian Bank of Commerce v. Rolston*, *supra*; citing *Heward v. Wolfenden*, *supra*; *Cronn v. Chamberlin*, *supra*; *Samis v. Ireland*, *supra*.

(*y*) *McCabe v. Thompson*, 1857, 6 Gr. 175; *McDonald v. McDonnell*, 1864, 2 U.C.E. & A. 393; *Fitzgibbon v. Duggan*, 1865, 11 Gr. 188.

(*z*) *Doe d. Webster v. Fitzgerald*, 1839, E.L. 2 Vict., 4 Ont. Dig. 2647.

tenements so sold in like manner as the mortgagor might have done; and thereupon the purchaser, his heirs and assigns, shall acquire the same estate, right and title as the mortgagor would have acquired in case the payment, removal or satisfaction had been effected by the mortgagor.

Where mortgaged lands are sold by the sheriff the purchaser acquires only the title that the mortgagor had at the time the writ was delivered to the sheriff, not the title that the mortgagor had at the time of entering judgment (*a*). The purchaser of an equity of redemption under a writ of execution is entitled to possession as against the mortgagor in possession (*b*), but not as against a prior mortgagee in possession (*c*).

A sale of the equity of redemption under an execution against the mortgagor will not be set aside, in the absence of fraud or irregularity, merely on the ground of the inadequacy of the price obtained (*d*).

§154. *Who may purchase at sheriff's sale.*

It is further provided in Ontario by the Execution Act, R.S.O. 1914, c. 80, s. 33, as follows:

33. A mortgagee of land, or the executors, administrators or assigns of a mortgagee, being or not being the execution creditor, may be the purchaser at the sale, and shall acquire the same estate, interest and rights thereby as any other purchaser, but in that event he or they shall give to the mortgagor a release of the mortgage debt; and if another person becomes the purchaser, and if the mortgagee, his executors, administrators or assigns shall enforce payment of the mortgage debt by the mortgagor the purchaser shall repay the debt and interest to the mortgagor, and in default of payment thereof within one month after demand the mortgagor may recover the debt and interest from the purchaser, and shall have a charge therefor upon the mortgaged land.

(*a*) *Pegge v. Metcalfe*, 1856, 5 Gr. 628.

(*b*) *Fisken v. McMullen*, 1862, 12 U.C.C.P. 85.

(*c*) *Doe d. Richardson v. Dickson*, 1832, 2 U.C.O.S. 292.

(*d*) *Parr v. Montgomery*, 1880, 27 Gr. 521.

Where the judgment creditor, being also mortgagee, purchased at a sheriff's sale the equity of redemption in the lands comprised in his mortgage, bidding therefor just enough to cover the amount due on the execution but paying no money except the costs of the sheriff, it was held that the alleged sale was not a real sale and that the sheriff's deed made in pursuance thereof was void (*e*).

The position of a mortgagee purchasing the equity of redemption at a sheriff's sale is different from that of a stranger who purchases. A mortgagee purchasing, even if he is the holder of the judgment under which the sale takes place, must give to the mortgagor a release of the mortgage debt (*f*). If another person purchases, the mortgagee is of course still entitled to recover the mortgage debt from the mortgagor, and in that event the purchaser is in the same position as if he had brought the equity of redemption from the mortgagor and is subject to the ordinary obligation to indemnify his vendor arising from the fact of purchase subject to a charge (*g*).

A mortgagee may purchase the equity of redemption under an execution without thereby merging the mortgage debt as against any subsequent mortgagee or person having a charge on the same property (*h*).

(*e*) *Samis v. Ireland*, 1879, 4 O.A.R. 118.

(*f*) *Samis v. Ireland*, *supra*. See the Execution Act, s. 33, *supra*.

(*g*) The latter portion of s. 33 expresses this obligation in statutory form. See chapter 14, *Transfer of the Equity of Redemption*, §134.

(*h*) R.S.O. 1914, c. 112, s. 9, quoted in chapter 21, *Merger*, §204.

CHAPTER XVII.

PERSONS ENTITLED ON DEATH OF THE MORTGAGOR.

§161. Devolution of equity of redemption, p. 266.

§162. The Devolution of Estates Act, p. 268.

§163. Locke King's Act, p. 271.

§164. Estates of insolvent deceased persons, p. 273.

§161. *Devolution of equity of redemption.*

The mortgagor's interest in mortgaged land was at common law merely a right to get back the estate upon performance of the condition subject to which it was conveyed by the mortgage (*a*), but in equity it was regarded for many purposes as if it were an estate in the land (*b*). Although the mortgagor was not seised of the land (*c*), nevertheless equity followed the law and attached to the equity of redemption many of the incidents and characteristics belonging to legal estates. The equity of redemption might be mortgaged, conveyed or devised as if it were the legal estate. On the death of the owner intestate it devolved like the legal estate (*d*)—so much so that if the legal ownership of the land was subject to some peculiar custom of descent, such as that applicable to land held in borough-english or gavelkind, the equitable interest devolved according to the custom (*e*).

(*a*) See chapter 2, *Mortgage at Common Law*, §12.

(*b*) See chapter 3, *Legal Mortgage in Equity*, §§21, 28.

(*c*) *Copestake v. Hoper*, [1908] 2 Ch. 10. See further reference to this case in chapter 3, §29.

(*d*) As to the present mode of devolution in Ontario, see the Devolution of Estates Act, in §162, *infra*.

(*e*) See *In re Hudson*, *Cassels v. Hudson*, [1908] 1 Ch. 655. Apart from statute, if the assignee of the equity of redemption pays off a mortgage of land and takes it with a declaration against merger, even though it is expressly stated in the declaration that the mort-

Apart from statute, lands held by any person in fee simple upon any trust or by way of mortgage are subject to escheat (*f*), but an equitable estate or interest does not escheat for such an estate or interest is a mere creature of equity and not a subject of tenure (*g*). In England it is provided by the Intestates Estates Act, 1884, (*h*), that where a person dies without an heir and intestate in respect of any real estate consisting of an equitable estate or interest in any corporeal hereditament, the law of escheat shall apply in the same manner as if such estate or interest were a legal estate in corporeal hereditaments. There appears, however, to be no statute to similar effect in any province of Canada (*i*), and upon the death of a mortgagor without heirs the mortgagee would therefore hold absolutely for his own benefit, subject to payment of the debts of the mortgagor, whose personal representative might redeem (*j*).

gage is kept alive for the purpose of protecting the assignee and for no other purpose whatever, the mortgage would devolve as personalty while the equity would devolve as realty. See *In re Gibbon*, *Moore v. Gibbon*, [1909] 1 Ch. 367; *Strahan*, *Law of Mortgages*, 2nd ed., pp. 52-53.

(*f*) See chapter 13, *Persons entitled on Death of the Mortgagee*, §121.

(*g*) *Williams*, *Real Property*, 21st ed., 191; *Gaillard v. Hawkins*, 1884, 27 Ch.D. 298.

(*h*) 47 & 48 V. c. 71, s. 4.

(*i*) See article by Walter S. Scott in 37 C.L.T. 764 (November, 1916).

(*j*) *Beale v. Symonds*, 1853, 16 Beav. 406; *Coote*, *Law of Mortgages*, 8th ed., vol. 1, p. 666; *Fisher*, *Law of Mortgages*, 6th ed., pp. 739, 740. Whether the result would be the same if the mortgagee were merely an equitable mortgagee is more doubtful. *Underhill*, *Law of Trusts*, 7th ed., p. 210, submits that on the principle of *Onslow v. Wallis*, 1849, 1 Mac. & G. 506, the result would be the same. It has been decided that where the fee out of which a mortgage term has been carved escheats to the lord he may redeem. *Downe (Viscount) v. Morris*, 1844, 3 Hare 394; *Lewin*, *Law of Trusts*, 12th ed., p. 277; *Fisher*, *op. cit.*, p. 740.

§162. *The Devolution of Estates Act.*

In Ontario by virtue of the Devolution of Estates Act, R.S.O. 1914, c. 119, upon the death of the owner of the equity of redemption in lands (whether testate or intestate, and notwithstanding any testamentary disposition) his interest devolves to and becomes vested in his personal representative as trustee for the persons by law beneficially entitled thereto, and, subject to the payment of his debts, and so far as such interest is not disposed of by deed, will, contract or other effectual disposition, it is distributed as if it were personal property not so disposed of (*k*).

So long as the equity of redemption remains vested in the personal representatives of the mortgagor or other owner of the equity of redemption, an action for foreclosure or sale is properly constituted if the personal representatives and not the persons beneficially entitled are made defendants (*l*).

It is further provided by the Devolution of Estates Act, ss. 5 and 6, as follows:

5. Subject to the other provisions of this Act in the administration of the assets of a deceased person, his real property shall be administered in the same manner, subject to the same liability for debts, costs and expenses and with the same incidents as if it were personal property, but nothing in this section shall alter or affect as respects real or personal property of which the deceased has made a testamentary disposition the order in which real and personal assets are now applicable to the payment of funeral and testamentary expenses, the costs and expenses of administration, debts or legacies, or the liability of real property to be charged with the payment of legacies.

(*k*) See s. 3 of the statute quoted in chapter 13, *Persons entitled on Death of Mortgagee*, §123. See also s. 13 of the same statute, referred to in §123, providing for the vesting in the persons beneficially entitled of real property not disposed of, divided among the persons beneficially entitled or conveyed by the personal representative within three years after the death of the owner.

(*l*) *Plenderleith v. Smith*, 1905, 10 O.L.R. 188; see chapter 24, *Action for Foreclosure or Sale*, §234. As to service of notice of exercising a power of sale upon the "heirs" of the mortgagor, see chapter 31, *Sale under Power of Sale*, §329.

6. Subject to provisions of section 38 of *The Wills Act* the real and personal property of a deceased person comprised in any residuary devise or bequest shall, except so far as a contrary intention appears from his will or any codicil thereto, be applicable rateably, according to their respective values, to the payment of his debts, funeral and testamentary expenses and the cost and expenses of administration.

It will be observed that although under s. 5 the real property of a deceased person is subject to the same liability for debts as if it were personal property, that is, as regards the creditor's remedies, the section does not "alter or affect the order in which real and personal assets are now applicable to the payment" of debts, that is, as regards the beneficiaries of the estate.

So far as the beneficiaries are concerned, the personal estate of a testator not specifically bequeathed is the primary fund for the payment of his debts unless such estate is exonerated by express words or necessary implication (*m*). The rule was formerly applied, subject to some exceptions, even in the case of a mortgage debt but in this respect it has been reversed by the statute commonly known as Locke King's Act, being s. 38 of the Wills Act (*n*). The rule has also been modified in Ontario by the provisions now contained in s. 6 of the Devolution of Estates Act quoted above, which renders the real and personal property of a deceased person comprised in any residuary devise or bequest applicable rateably according to their respective values to the payment of his debts (*o*).

Subject only to the change effected by s. 6 of the Devolu-

(*m*) *Ancaster (Trustee of) v. Mayer*, 1785, 1 Bro. Ch. 453, 1 W. & T.L.C. Eq. 1, 18 R.C. 10.

(*n*) See §163, *infra*.

(*o*) *Scott v. Supple*, 1893, 23 O.R. 393. It was held that Locke King's Act was not superseded by, but should be read together with, the Devolution of Estates Act. *Mason v. Mason*, 1887, 13 O.R. 725. In accordance with this decision s. 6 of the Devolution of Estates Act is now expressed to be subject to s. 38 of the Wills Act.

tion of Estates Act (*p*) and to Locke King's Act, the real and personal estate of a deceased person is applicable in payment of his debts, so far as he has not indicated an intention to the contrary, in the following order (*q*):

(1) The general personal estate, or residuary personalty, not specifically bequeathed or expressly or impliedly exonerated (excluding a fund to be retained to meet pecuniary legacies).

(2) Real estate devised in trust for (not merely charged with) the payment of debts.

(3) Real estate descended, whether possessed by the testator at the date of his will or acquired afterwards.

(4) Real or personal property charged with the payment of debts and devised, or specifically bequeathed subject to such charge, rateably *inter se*. Where part of the property charged lapses, the lapsed share contributes rateably, and is not liable until after descended estate.

(5) General pecuniary legacies *pro rata* and demonstrative legacies in so far as there is a deficiency in the designated fund.

(6) Specific and residuary devises, and specific bequests, not charged with debts, rateably *inter se*. When, however, a specific bequest is made which has been charged with a debt in the lifetime of the testator, then, although the real estate is charged with the payment of debts, the property specifically bequeathed must first be applied in payment of the particular debt charged upon it.

(7) Real and personal estate appointed by will under a general power of appointment. Where, however, a power of appointment is exercised by a general bequest the property

(*p*) *Re Hopkins Estate*, 1900 32 O.L. 31.

(*q*) See 1 W. & T.L.C. Eq. pp. 31, 32, in the notes to *Ancaster (Duke of) v. Mayer*, *supra*; Williams, *Real Property*, 21st ed., p. 282 note; Maitland, *Equity and the Forms of Action*, pp. 207

and is not to be exercised as forming part of the bequest, but is not an exercise of the power, and is therefore not necessary to be included in other assets of the testator.

8) Willows's personalty, is now capable of existing.

§163 *Locke King's Act*

Originally, to discharge a mortgage of land, the mortgagee had to discharge the debt, which was usually payable out of the proceeds of the mortgage. The debt of the mortgagee was the debt of the mortgagor himself, so that the mortgagee was entitled, as a rule, to have the land sold to satisfy the mortgage at the expense of the mortgagor. But this rule was reversed in 1854, by the Statute of 1854, commonly known as *Locke King's Act*, and the Statute amending 1854. The Statutes have in substance been embodied in the Wills Act, 1900, and are now embodied in the Wills Act, 1900, s. 38, as follows (a):

“(1) Where any person has died since the 31st day of January 1865, or thereafter dies, seized of or entitled to any real estate, which, at the time of his death, was charged with the payment of any sum of money by way of mortgage, and the person has not, by his will or deed or other document, signified his intention, the heir or devisee to whom such real estate descends or is devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate of the deceased.”

§164

The rule was subject to some exceptions. The law prior to the passing of *Locke King's Act* is briefly stated, and the effect of the Act and the statutes amending it is discussed in 1 W. & A. at pp. 22 ff., in the notes to *Ancaster (Duke of) v. Mayer*.

& 18 V. c. 113; 30 & 31 V. c. 69; 40 & 41 V. c. 34.

It was expressed in its present form in 1910 by 10 E. 7, s. 38. Sub-s. 1 and 3 are in effect the same as the English Act of 1854, and sub-s. 2, read along with the definition of “mortgage” is in substance to the same effect as the English statutes of 1867 and 1877. See, however, the definition of “real estate” in the Ontario statute.

estate, or any other real estate of such person, but the real estate so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same is charged, every part thereof according to its value bearing a proportionate part of the mortgage debts charged on the whole thereof.

(2) In the construction of a will to which this section relates, a general direction that the debts, or that all the debts, of the testator shall be paid out of his personal estate, or a charge or direction for the payment of debts upon or out of residuary real estate and personal estate or residuary real estate shall not be deemed to be a declaration of an intention contrary to or other than the rule in subsection 1 contained, unless such contrary or other intention is further declared by words expressly or by necessary implication referring to all or some of the testator's debts charged by way of mortgage on any part of his real estate.

(3) Nothing herein shall affect or diminish any right of the mortgagee to obtain full payment or satisfaction of his mortgage debt, either out of the personal estate of the person so dying or otherwise; and nothing herein shall affect the rights of any person claiming under any will, deed or document made before the first day of January, 1874.

By s. 2 of the Wills Act "mortgage" is defined as including any lien for unpaid purchase money, and any charge, incumbrance, or obligation of any nature whatever upon any land or tenements of a testator or intestate, and "real estate" is defined as including messuages, land, rents, and hereditaments, whether freehold or of any other tenure, and whether corporeal, incorporeal or personal, and any undivided share thereof, and any estate, right, or interest (other than a chattel interest) therein (r).

The result of the statute is that as regards the beneficiaries of the estate of a deceased mortgagor *inter se* a mortgage debt is *prima facie* chargeable against the mortgaged land, and in view of sub-s. 2 the signification of the deceased mortgagor of a "contrary or other intention" under sub-s. 1 must be

(r) In England by virtue of the amending statute of 1877 Locke King's Act applies to leaseholds. See *In re Kershaw*, *Drake v. Kershaw*, 1888, 37 Ch.D. 674, where the text of the English statutes is set out; cf. *In re Fraser*, *Lowther v. Fraser*, [1904] 1 Ch. 111, 726.

such terms as unmistakably refer to or describe his mortgage debts or the particular mortgage debt in question (*nc*). A mortgage debt need not however be referred to as such, if it is sufficiently identified and happens to be secured by mortgage (*no*).

If the testator directs his debts, including his mortgage debts, to be paid by his executors, without specifying the fund out of which they are to be paid, and devises and bequeaths real and personal property to his executors to be converted into money, the mortgage debts will be payable out of the mixed fund thus directed to be created and the burden of the charges must be contributed to rateably by the realty and personalty from which the fund is derived (*ng*). So, if a testator charges his estate with payment of the mortgages upon his lands, the mortgage debts will be payable out of the residue of the estate in exoneration of a mortgaged parcel of land specifically devised (*nz*).

§164. *Estates of insolvent deceased persons.*

It is provided in Ontario by the Trustee Act, R.S.O. 1914, c. 121, ss. 53, 63, 64 and 65, as follows:

53. On the administration of the estate of a deceased person, in the case of a deficiency of assets, debts due to the Crown and to the personal representative of the deceased person, and debts to others,

(*nc*) *Nelson v. Page*, 1868, L.R. 7 Eq. 25. Illustrations of insufficient signification of a "contrary or other intention" are afforded by *In re Newmarch*, *Newmarch v. Storr*, 1878, 9 Ch.D. 12; *In re Rossiter*, *Rossiter v. Rossiter*, 1879, 13 Ch.D. 355; *Elliott v. Dearley*, 1880, 16 Ch.D. 322; *In re Smith*, *Hannington v. True*, *Giles v. True*, 1886, 33 Ch.D. 195; *Mason v. Mason*, 1887, 13 O.R. 725. In the following cases the intention was held to be sufficiently expressed. *In re Fleck*, *Colston v. Roberts*, 1888, 37 Ch.D. 677; *In re Campbell*, *Campbell v. Campbell*, [1893] 2 Ch. 206; *In re Valpy*, [1906] 1 Ch. 531.

(*x*) *In re Fleck*, *Colston v. Roberts*, *supra*.

(*y*) *Re Le Brun*, 1916, 36 O.L.R. 125, 28 D.L.R. 386.

(*z*) *Scott v. Supple*, 1893, 23 O.R. 393.

including therein debts by judgment or order, and other debts of record, debts by specialty, simple contract debts, and such claims for damages as are payable in like order of administration as simple contract debts shall be paid *pari passu* and without any preference or priority of debts of one rank or nature over those of another; but nothing herein shall prejudice any lien existing during the lifetime of the debtor on any of his real or personal property.

Under this section foreign creditors are entitled to payment *pari passu* with Ontario creditors (a).

63.—(1) On the administration of the estate of a deceased person, in case of a deficiency of assets, every creditor in proving his claim shall state whether he holds any security for his claim or any part thereof, and shall give full particulars of the same, and if such security is on the estate of the deceased debtor or on the estate of a third person for whom the estate of the deceased debtor is only indirectly or secondarily liable the creditor shall put a specified value on such security, and the personal representative, under the authority of the other creditors of the estate of the deceased, or of the court if the estate is being then administered under the direction of or by a court, may either consent to the creditor's ranking for the claim, after deducting such valuation, or may require from the creditor an assignment of the security, at an advance of ten per cent. upon the specified value to be paid out of the estate as soon as the personal representative has realized such security, in which he shall be bound to the exercise of ordinary diligence; and in either case the difference between the value at which the security is retained or taken, as the case may be, and the amount of the claim of the creditor shall be the amount for which he shall rank upon the estate of the deceased debtor.

(2) If the claim of the creditor is based upon a negotiable instrument upon which the estate of the deceased debtor is only indirectly or secondarily liable, and which is not mature or exigible, the creditor shall be considered to hold security within the meaning of this section, and shall put a value on the liability of the person primarily liable thereon, as his security for the payment thereof, but after the maturity of such liability and its non-payment, he shall be entitled to amend and re-value his claim.

64. A creditor holding any such security on the estate of a deceased debtor, or on the estate of a third person for whom the estate

(a) *Milne v. Moore*, 1894, 24 O.R. 456, following *In re Kloebe, Kannreuther v. Geiselbrecht*, 1884, 28 Ch.D. 175. Under an assignment for the general benefit of creditors, the crown has no priority over other creditors. *Clarkson v. Attorney-General of Canada*, 1889, 16 O.A.R. 202.

of such debtor is only indirectly or secondarily liable, may release or deliver up such security to the personal representative, or he may, by statutory declaration delivered to the personal representative, set a value upon such security; and from the time he shall have so released or delivered up such security or valued the same the debt to which such security applied shall be considered as an unsecured debt of the estate, or as being secured only to the extent of the value set upon such security; and the creditor may rank and exercise all the rights of an ordinary creditor for the amount of his claim, or to the extent only of so much thereof as exceeds the value set upon such security as the case may be.

65.—(1) Where a person claiming to be entitled to rank on the estate holds security for his claim or any part thereof, of such a nature that he is required by this Act to value it, and he fails to value the same, the Judge of the Surrogate Court who granted the probate or letters of administration may, upon summary application by the personal representative, of which application three days' notice shall be given to such claimant, order that unless a specified value shall be placed on such security and notified in writing to the personal representative within a time to be limited by the order such claimant shall, in respect of the claim, or the part thereof for which the security is held, be wholly barred of any right to share in the proceeds of such estate.

(2) If a specified value is not placed on such security and notified in writing to the personal representative according to the exigency of the order, or within such further time as the Judge may allow, the claim or the part thereof, as the case may be, shall be wholly barred as against such estate.

(3) Where an estate is being administered by or under the direction of a court such court shall exercise the jurisdiction conferred by this section upon the Judge of the Surrogate Court.

Provisions similar to ss. 63 and 65 of the Trustee Act are contained in the Assignments and Preferences Act, R.S.O. 1914, c. 134, s. 25. sub-ss. 4, 5, 6, and 7 (b). The provisions of the Trustee Act in question were first enacted in Ontario in 1896 (c), and their effect was to adopt in the administration of the estates of insolvent deceased persons the English bankruptcy practice in place of the former English Chancery prac-

(b) The effect of the latter provisions is discussed in Cassels, *Ontario Assignments Act*, 4th ed., pp. 130 ff.

(c) 59 V. c. 22, an Act respecting the Estates of Insolvent Deceased Persons.

the (*d*). In the English Court of Chancery, according to what is commonly known as the rule in *Mason v. Blogg* (*e*), a secured creditor might prove against the general estate of his deceased debtor for the whole of his debt and realize his security as well, provided he did not get more than twenty shillings in the pound, (*f*).

(*d*) In England the bankruptcy practice was made applicable to the administration of estates of deceased persons by s. 10 of the Judicature Act of 1875, and in Ontario was in substance adopted as the rule under voluntary assignments for the general benefit of creditors in 1885 by 48 V. c. 26, s. 18.

(*e*) 1837, 2 My. & Cr. 443; *Eastman v. Bank of Montreal*, 1885, 10 O.R. 78.

(*f*) See Maitland, *Equity and the Forms of Action*, pp. 194, 195, 203 ff.

CHAPTER XVIII.

DOWER AND CURTESY IN MORTGAGED LAND.

- §171. Dower in legal estate, p. 277.
§172. Dower in equity of redemption, 1834-1879, p. 281.
§173. Dower in equity of redemption since 11th March, 1879, p. 282.
§174. Quantum of dower in equity of redemption, p. 286.
§175. Bar and forfeiture of dower, p. 291.
§176. Tenancy by the curtesy, p. 297.
§171. *Dower in legal estate.*

It is provided in Ontario by the Dower Act, R.S.O. 1914, c. 70, s. 2, as follows:

2. A widow, on the death of her husband, may tarry in his chief house for forty days after his death, within which time her dower shall be assigned her (a), if it has not been assigned her before, and in the meantime she shall have her reasonable maintenance; and for her dower shall be assigned to her the third part of all the lands of her husband, whereof he was seised at any time during coverture, except such thereof as he was seised of in trust for another. 25 E. 1; Magna Charta, c. 7.

Apart from statute, dower is an incident of the legal estate. As a mortgagor of land has only an equitable interest, his widow had formerly no right of dower in the mortgaged land. On the other hand, the legal estate being in the mortgagee, his widow was at common law entitled to dower, but so long as the legal right to redeem existed the inchoate right to dower might be defeated by the payment of the mortgage at the time fixed for payment, and after the legal right to redeem was

(a) As to procedure and as to assignment of dower, see R.S.O. 1914, c. 70, ss. 21 ff.; rules 5, 51, 52 and 543, and form 122; R.S.O. 1914, c. 114, s. 4 (the Partition Act); *McNally v. Anderson*, 1914, 31 O.L.R. 561, 19 D.L.R. 775; *Allan v. Rever*, 1902, 4 O.L.R. 309

lost, so long as the equitable right to redeem existed, equity by injunction prevented the right of dower in the mortgagee's estate from being asserted (*b*).

In Ontario a husband who becomes the owner of the legal estate in the lands during coverture cannot defeat his wife's claim to dower without her concurrence. In England, by the Dower Act, 1833, under which a wife first became entitled to dower in equitable interests (*c*), it was also enacted in effect that the wife's claim to dower might be excluded by a declaration to that effect contained in a conveyance to her husband or in a deed executed by him, or might be defeated by the absolute disposition of the land by her husband in his lifetime or by his will. These provisions by which complete control over the wife's dower rights was given to the husband have not been adopted in Ontario. The English statute as a whole came into force in British Columbia, Manitoba and the Northwest Territories (including Saskatchewan and Alberta) by virtue of the subsequent general adoption of English law (*d*), and the English statute has been expressly re-enacted in British Columbia (*e*). In Manitoba, Saskatchewan, Alberta and the Northwest Territories dower was afterwards abolished by statute (*f*), but more recently in Manitoba, Saskatchewan and Alberta certain restrictions have been placed upon the right of a husband to sell, mortgage or otherwise dispose of his "homestead" as defined in the statutes without the written

(*b*) Co. Litt. 205, and note; Strahan, *Law of Mortgages*, 2nd ed., p. 128; *Ham v. Ham*, 1857, 14 U.C.R. 497; *Flack v. Longmate*, 1845, 8 Beav. 420.

(*c*) As to dower in equitable interests, see §§172, 173, *infra*.

(*d*) English law was adopted in British Columbia as of the 19th November, 1858, in Manitoba and the Northwest Territories as of the 15th July, 1870.

(*e*) R.S.B.C. 1911, c. 68, the Dower Act.

(*f*) R.S.M. 1913, c. 54, s. 19; R.S.S. 1909, c. 43, s. 22; *Alta* statutes, 1906, c. 19, s. 5; R.S.C. 1906, c. 110, s. 12.

consent of his wife executed and proved in the manner therein prescribed (*g*).

Dower at common law was where the husband of a woman was seised of an estate of inheritance and died; in that case the wife was entitled to the third part of all lands and tenements whereof the husband was seised at any time during the coverture to hold to herself for the term of her natural life. The requisites of dower were marriage, seisin of the husband and death of the husband. An inchoate right of dower is a right begun but not completed; a right where the two first requisites exist but not the third. It is merely a prospective right which a woman has in the hands of her husband while he is living; it may ripen into an actual right on his death, and it may be defeated by her death before her husband's. If the husband is seised of the legal estate in lands at any time during the coverture, even momentarily, the right of dower attaches. The seisin need not be actual seisin or possession; seisin in law is sufficient.

It is provided in Ontario by the Dower Act, R.S.O. 1914, c. 70, s. 5, as follows:

5. Where a husband has been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same if he had recovered possession thereof, she shall be entitled to dower out of the same, although her husband did not recover possession thereof; but such dower shall be sued for or obtained within the period during which such right of entry or action might be enforced.

If the husband has possession at any time during coverture the wife's right to dower is not affected although he may have been dispossessed during coverture and his right to recover possession may have been barred by lapse of time. In that case

(*g*) Sask. statutes, 1915, c. 29, as amended by 1916, c. 27, and 1917, c. 34; Alta. statutes, 1917, c. 14; Man. statutes, 1918, c. 21

the widow has after the husband's death the full time allowed by statute within which she may enforce her right (*h*).

It is further provided by the Dower Act, ss. 6, 7 and 8, as follows:

6. Dower shall not be recoverable out of any separate and distinct lot, tract, or parcel of land which at the time of the alienation by the husband or at the time of his death, if he died seised thereof, was in a state of nature, and unimproved by clearing, fencing or otherwise for the purposes of cultivation or occupation; but this shall not restrict or diminish the right to have woodland assigned to the dowress under section 29, from which it shall be lawful for her to take firewood necessary for her own use, and timber for fencing the other portions of the same lot, tract or parcel assigned to her.

7. No dower shall be recoverable out of any land which has been heretofore or shall be hereafter granted by the Crown as mining land in case such land is, on or after the 31st day of December, 1897, granted or conveyed to the husband of the person claiming dower and he does not die entitled thereto.

8. Land dedicated by the owner thereof for a street or public highway shall not be subject to any claim for dower by the wife of the person by whom the same was dedicated.

A widow is not entitled to dower out of lands to which her husband at the time of his death was entitled as joint tenant; for the estate is not an estate of inheritance, but passes on the death of the husband to the surviving joint tenant. The widow of the survivor would, however, be entitled to dower.

(i). The estate of a tenant in common in lands other than partnership lands is an estate of inheritance and is subject to dower (j).

An estate is not subject to dower unless it be an estate of inheritance in possession. An estate in remainder or reversion

(h) *McDonald v. McMillan*, 1861, 2 F.C.R. 262. As to the limitation of actions for dower, see the Limitations Act, R.S.O. 1914 c. 75, ss. 26, 27 and 28; *Cope v. Cope*, 1895, 26 O.R. 141; *Williams v. Thomas*, [1909] 1 Ch. 742.

(i) *Haskill v. Flis*, 1862, 12 F.C.P. 383.

(j) *Ham v. Ham*, 1857, 14 F.C.R. 497; *In re Music Hall Block, Dumble v. McIntosh*, 1884, 8 O.R. 22.

sion in fee, expectant on a life estate, is not subject to dower if the husband sell his estate or die during the currency of the life estate, for the seisin is in the life tenant (*k*).

It is provided by the Devolution of Estates Act, R.S.O. 1914, c. 119, s. 9, as follows:

9.—(1) Nothing in this Act shall take away a widow's right to dower; but a widow may by deed or instrument in writing, attested by at least one witness, elect to take her interest under this Act in her husband's undisposed of real property in lieu of all claim to dower in respect of the real property of which her husband was at any time seised, or to which at the time of his death he was beneficially entitled; and unless she so elects she shall not be entitled to share in the undisposed of real property.

(2) The personal representative of the deceased may, by notice in writing, require his widow to make her election, and if she fails to execute and deliver a deed or instrument of election to him within six months after the service of the notice she shall be deemed to have elected to take her dower.

(3) Where the widow is an infant or a lunatic the right of election may be exercised on her behalf by the Official Guardian, with the approval of a Judge of the Supreme Court or by some person authorized by a Judge of the Supreme Court to exercise it; and the Official Guardian or the person so authorized may, for and in the name of the widow, give all notices and do all acts necessary or incidental to the exercise of such right.

§172. *Dower in equity of redemption, 1834-1879.*

At common law a widow was not entitled to dower in any equitable interest of her husband (*l*), but this rule was changed in England by the Dower Act, 1833, adopted in Upper Canada in 1834 by the statute 4 W. 4, c. 1, ss. 13, 14 and 15. The present provision in Ontario is contained in the Dower Act, R.S.O. 1914, c. 70, s. 4, as follows:

4. Where a husband dies beneficially entitled to any land for an interest which does not entitle his widow to dower at common law, and such interest, whether wholly equitable or partly legal and partly equitable, is, or is equal to an estate of inheritance in possession (other than an estate in joint tenancy), his widow shall be entitled to dower out of such land

(L) *Leitch v. McLellan*, 1883, 2 O.R. 581.

(l) See §171, *supra*.

Where a woman is entitled to dower at common law she is so entitled whether her husband aliens the land before his death or not, but under s. 4 of the Dower Act the widow is not entitled to dower in equitable estates unless her husband dies beneficially entitled thereto. Thus a person equitably entitled to lands, who had not paid his purchase money or obtained a conveyance, created a mortgage thereon containing a power of sale in default of payment. The power of sale was exercised after the death of the mortgagor. Afterwards the widow of the mortgagor claimed dower, but it was held that dower attaches only to such equitable estates as the husband dies seised of; and that the sale when made had relation to the time of creating the power, thereby overreaching the title to dower (*m*).

The same principle was applicable in a case where the husband was at one time seised and subsequently made a mortgage in which the wife joined to bar her dower. The wife was in such case entitled to dower only if the husband died beneficially entitled to the equity of redemption, and the husband might defeat the claim to dower by conveying away the equity or mortgaging it in his lifetime without his wife's concurrence (*n*).

§173. *Dower in equity of redemption since 11th March, 1879.*

Since the 11th of March, 1879, in order to determine whether dower attaches at all, it is necessary to distinguish between the case of a husband acquiring land already subject to mortgage and the case of his acquiring the legal estate and

(*m*) *Smith v. Smith*, 1852, 3 Gr. 451.

(*n*) *Moffatt v. Thompson*, 1851, 3 Gr. 111; *Re Robertson, Robertson v. Robertson*, 1878, 25 Gr. 276, at p. 280, and, on appeal, 25 Gr. 486, at pp. 488, 500; *Fleury v. Pringle*, 1878, 26 Gr. 67, at p. 68; *Anderson v. Elgie*, 1903, 6 O.L.R. 147. The contrary had been held in *Barry v. Laycock*, 1871, 18 Gr. 611. As to the quantum of dower, see §174, *infra*.

subsequently making a mortgage of it. If he acquires merely the equity of redemption, or if at the time of his marriage he has merely the equity of redemption, the case is governed by s. 4 of the Dower Act (*o*), the widow has no claim to dower unless the husband dies beneficially entitled, and the husband is able to defeat her claim by conveying away his interest in his lifetime (*p*).

A purchaser of land subject to mortgage paid off the mortgage and procured a discharge in favour of the mortgagor, and on the same day obtained a conveyance from him, giving back a mortgage, with bar of dower, for the balance of the purchase money. The instruments were registered in the order mentioned. It was held that the wife of the purchaser was not entitled to dower out of a surplus arising on a sale under a subsequent incumbrance, her husband never having been momentarily seised of the legal estate in the land (*q*).

In another case the plaintiff had joined in a mortgage with her husband to bar dower, and her husband had afterwards assigned his equity of redemption to an assignee for the benefit of creditors, and the mortgagees were taking proceedings to sell. The plaintiff claimed a declaration that she was entitled to an inchoate right of dower and to have a portion of any surplus on such sale set apart to answer her dower, when it should arise on the death of her husband. The declaration was refused, it being held that what was asked was a declaration as to a claim which might be made by another or others under circumstances which might or might not happen (*r*).

On the other hand, in the case where a husband has at one time the legal estate and it is converted into an equitable in

(*o*) See §172, *supra*.

(*p*) *Gardner v. Brown*, 1890, 19 O.R. 202; *Fitzgerald v. Fitzgerald*, 1903, 5 O.L.R. 279; *Brown v. Brown*, 1904, 8 O.L.R. 332.

(*q*) *Re Luckhardt*, 1898, 29 O.R. 111.

(*r*) *Bunnell v. Gordon*, 1890, 20 O.R. 281.

terest by a mortgage made by him in which his wife joins to bar her dower, a new provision was enacted in Ontario by the statute 42 Vic. c. 22, s. 1, applicable to mortgages made since the 11th day of March 1879 (s). This provision is now contained in the Dower Act, R.S.O. 1914, c. 70, s. 10, sub s. 1, as follows:

10. (1) No bar of dower contained in any mortgage or other instrument intended to have the effect of a mortgage or other security upon land shall operate to bar such dower to any greater extent than shall be necessary to give full effect to the rights of the mortgagee or grantee under such instrument (t).

Prior to this enactment, if a married woman joined with her husband in a mortgage to bar her dower, she was not entitled to dower in the equitable estate which remained in her husband after the mortgage, unless he died beneficially entitled thereto; and the husband might defeat the claim to dower by a transfer in his lifetime of his equitable estate (u).

The effect of the enactment of 1879 is that a married woman is entitled to dower out of an equity of redemption in land, whether or not her husband dies seised of it, where such an equity has arisen by his having executed a mortgage of the legal estate in which she has joined to bar her dower.

Before the passing of the Act 42 Vic. c. 22 a married woman was entitled to dower out of an equitable estate, only when the husband died seised of it. Since the passing of that act, she is entitled to dower out of an equitable estate regardless of the husband's dying seised of it, when the equitable estate comes into existence by the husband, being owner of the land, executing a mortgage upon it, in which the wife joins to bar dower. The husband then has the equity of redemption, an equitable estate in the land of which, before the execution of such mortgage, he was the owner. This is the

(s) *Martindale v. Clarkson*, 1880, 6 O.A.R. 1. As to the other provisions of the statute of 1879, see §174.

(t) As to the question whether the wife is entitled to redeem and whether she is a proper or necessary party to an action for foreclosure or sale, see Chapter 24, *Action for Foreclosure or Sale*, §224.

(u) See §172 *infra*.

equitable estate out of which dower seems to be given by that statute" (r).

After some conflict of opinion it was decided that where a wife has joined in a mortgage to bar her dower her husband cannot defeat her right to dower in the equity of redemption by conveying away the equity without her concurrence (w).

Section 5 [now s. 6] appears to settle conclusively in favour of the wife the question as to the right of the husband to convey away, without his wife's concurrence but free from her dower, the equitable estate remaining in him after a mortgage in which she had joined; because, to hold otherwise would be to hold that the bar of dower in the mortgage operated not only to give full effect to the right of the mortgagee under the mortgage, but also enabled the husband to deal with the equity left in him to the prejudice of his wife's dower in it, and this would be contrary to the express provision in the section. An equity of redemption created in this way, that is, by a mortgage of the husband's legal estate, the wife joining to bar the dower is, therefore, under section 5 [now s. 10] an exception to the general rule contained in section 1 [now s. 4] of the same Act which gives a wife dower only in those equitable estates of which her husband dies seised" (r).

Where a widow has not joined in the first mortgage to bar dower, but joins in the second mortgage for that purpose, and the second mortgagee obtains priority over the first by prior registration, the widow is entitled to the surplus arising from a sale under the second mortgage in priority to the first mortgagee (y).

It is provided by the Land Titles Act, R.S.O. 1914, c. 126, s. 47, as follows:

47. Where registered land is transferred subject to a charge or where the registered owner of land which is subject to a charge

(r) *Re Luckhardt*, 1898, 29 O.R. 111, *Ferguson J.*, at p. 117.

(w) *Re Croskery*, 1888, 16 O.R. 207; *Pratt v. Bunnell*, 1891, 21 O.R. 1; *Gemmell v. Nelligan*, 1895, 26 O.R. 307; *Standard Realty Co. v. Nicholson*, 1911, 24 O.L.R. 46, at pp. 51, 52. As to the quantum of dower, see §174.

(x) *Pratt v. Bunnell*, 1891, 21 O.R. 1, *Street J.*, at p. 1.

(y) *Gray v.oughlin*, 1891, 18 Can. S.C.R. 553, reversing *MacLennan v. Gray*, 1889, 16 O.A.R. 224.

subsequently married, the wife of the transferee or owner shall have the same rights in respect of dower as she would have had if the legal estate had been transferred by an ordinary mortgage and no others.

§174. *Quantum of dower in equity of redemption.*

Prior to the 11th of March, 1879, when the question of dower in an equity of redemption was governed by the statute 4 W. 4, c. 1, a widow had no claim to dower unless her husband died beneficially entitled, whether he had acquired the land subject to an existing mortgage or whether he had acquired the legal estate and subsequently made a mortgage in which his wife had joined to bar her dower (2). There was however a difference between the two cases with regard to the quantum of the dower. In the first case the dower was calculated on the value of the equity of redemption merely, whereas in the second case, unless the mortgage was made to secure payment of unpaid purchase money, dower was calculated on the whole value of the land free from mortgage (a). "Where the mortgage has been given for the purchase money of the land, it is quite reasonable that the widow should only have dower in the value of the land after deducting the amount of the mortgage, for that was the extent of the beneficial interest of the husband (b)."

Since the 11th of March, 1879, the case of a husband acquiring land subject to an existing mortgage is still governed by 4 W. 4, c. 1 (c). The husband may defeat the claim to dower by conveying away the equity of redemption in his lifetime and the widow has no claim to dower unless the husband

(2) See §172, *supra*.

(a) *Re Robertson*, 1876, 24 Gr. 442; *Re Robertson, Robertson v. Robertson*, 1878, 25 Gr. 276, 486.

(b) *Proudfoot, V.C.*, 25 Gr. at p. 501. See review of the early cases in *Re Auger*, 1912, 26 O.L.R. 402, 5 D.L.R. 680, and in an article by Shirley Denison in 49 C.L.J. 201, at pp. 205-6 (April 1, 1913).

(c) Now R.S.O. 1914, c. 70, s. 4. See §172.

dies beneficially entitled (*d*). If he dies so entitled dower is calculated upon the value of the equity of redemption merely.

On the other hand, the case where a husband acquires the legal estate and subsequently makes a mortgage in which his wife joins to bar her dower is governed by the statute 42 V. c. 22, as subsequently amended. The husband cannot defeat the widow's claim to dower by conveying away the equity in his lifetime without her concurrence, and her claim to dower exists whether or not her husband dies beneficially entitled (*e*). The quantum of dower is also decided upon a different principle from that applicable to the case of a husband acquiring land subject to an existing mortgage.

The statute 42 V. c. 22, after providing (s. 1) that no bar of dower contained in any mortgage or other instrument intended to have the effect of a mortgage or other security, should operate to bar such dower to any greater extent than should be necessary to give full effect to the rights of the mortgagee or grantee (*f*), enacted (s. 2) as follows:

In the event of a sale of the land comprised in such mortgage or other instrument, under any power of sale contained therein or under any legal process, the wife of the mortgagor or grantor who shall have so barred her dower in such lands, shall be entitled to dower in any surplus of the purchase money arising from such sale, which may remain after satisfaction of the claim of the mortgagee or grantee, to the same extent as she would have been entitled to dower in the land from which such surplus purchase money shall be derived had the same not been sold.

There was some conflict of opinion as to the meaning of the statute. It was said in one case that the result was that dower was to be calculated in every case upon the surplus after satisfying the mortgage debt and not upon the whole value of the land (*g*). This was said, however, in a case in

(*d*) See §173, *supra*.

(*e*) See §173, *supra*.

(*f*) See §173, *supra*.

(*g*) *Pratt v. Bunnell*, 1891, O.R. 1.

which the mortgage was given to secure part of the purchase money, and as applied to such a case the dictum is correct, but as applied to a case in which the mortgage was given to secure a loan, not being for part of the purchase money, the dictum was opposed to opinions expressed in earlier cases and was subsequently dissented from.¹

In view of the conflict of opinion under the statute, and in accordance with what appeared to be the prevailing opinion as to the meaning of the statute as stated above, it was expressly provided in 1895 by the statute 58 Vict. c. 25, s. 4 that except where the mortgage is for the purchase money of the land

the amount in which the widow is entitled to dower shall be on the basis of the amount realized from the sale of the land and not of the amount realized from the sale over and above the amount of the mortgage only.²

The foregoing provisions are now contained in the Dower Act, R.S.O. 1914, c. 70, s. 10, as follows:

10. (1) No bar of dower contained in any mortgage or other instrument intended to have the effect of a mortgage or other security upon land shall operate to bar such dower to any greater extent than shall be necessary to give full effect to the rights of the mortgagee or grantee under such instrument.

(2) Where land comprised in such mortgage or other instrument is sold under any power of sale contained therein or under any legal process, the wife of the mortgagor or grantor who shall be so barred her dower in such land shall be entitled to dower in any surplus of the purchase money arising from such sale which may remain after satisfaction of the claim of the mortgagee or grantee to the same extent as she would have been entitled to dower in the land from which such surplus purchase money shall be derived had it not been sold and except where the mortgage or other instrument is for the purchase money of the land, the amount to

¹ *Oxley v. Gurnell v. Newman*, 1895, 26 O.R. 397; *Re Hague, Traders Bank v. Moore*, 1887, 14 O.R. 66; *Re Chesley*, 1888, 16 O.R. 20.

² It was also provided that "nothing in this section contained shall be construed to affect by implication or otherwise, any question in the case of mortgages heretofore executed."

which she is entitled shall be calculated on the basis of the amount realized from the sale of the land, and not upon the amount realized from the sale over and above the amount of the mortgage only.

The statute applies only to cases in which the mortgaged land has been sold under a power of sale in the mortgage or under legal process, but the principle mentioned in the statute as to the calculation of dower should be applied in a case where the land has not been sold, that is, where dower is to be calculated on the value of the land in excess of the mortgage, if the mortgage was given to secure the husband's debt for the unpaid purchase money of the land, and is to be calculated on the value of the land free from encumbrance if the mortgage was given to secure any other debt of the husband (*supra*).

The testator in his lifetime purchased property subject to a \$10,000 mortgage, which he assumed, but subsequently procured a new loan on the mortgage, in which his wife joined to bar dower, and paid the former mortgage off, the discharge being registered subsequent to the registration of the new mortgage. He afterwards made a further mortgage for \$16,500.58, in which his wife also joined to bar dower. Subsequently he entered into an agreement for the sale of the property, receiving \$500 on account. The agreement was carried out by his executrix, the purchase money being applied in paying off the two mortgages, taxes, etc., leaving a balance. It was held that the wife was not entitled to dower out of the balance of the purchase money after satisfying the charges, and that the doctrine of conversion did not apply so as to defeat her claim to dower therein.

It is further provided in the Dower Act, ss. 11 and 12, as follows:

11. (1) A mortgagee or other person holding any money out of which a married woman shall be dowable under the next preced

C. 10, V. 101, 1912, 3 O.L.R. 373, 4 O.L.R. 680.

C. 10, V. 110, 1903, 9 O.L.R. 113.

ing section may pay the same into the Supreme Court to the credit of such married woman and the other persons interested therein.

(2) The Supreme Court or a Judge thereof may, on a summary application, make such order as may be deemed just for securing the right of dower of a married woman in any money out of which she shall be allowable.

12. A widow shall not be entitled to take her interest in money under section 10, and, in addition thereto, a share of the money as personal estate.

§175. *Bar and forfeiture of dower*

The short form of bar of dower in mortgages in common use in Ontario is that provided by the Short Forms of Mortgages Act (1) as follows:

And the said wife of the said mortgagor hereby waives her dower in the said lands.

If the mortgage is expressed to be made in pursuance of the statute, a bar of dower in the foregoing form has the same effect as if it were in the following terms:

And the said wife of the said mortgagor for and in consideration of the sum of one dollar of lawful money of Canada, to her in hand paid by the said mortgagee at or before the sealing or delivery of these presents, the receipt whereof is hereby acknowledged hath granted and released, and by these presents doth grant and release unto the said mortgagee, his heirs, executors, administrators and assigns, all her dower, and right and title which, in the event of her surviving her said husband, she might or would have to dower, in, to, or out of the lands and premises hereby conveyed or intended so to be.

Dower may also be barred by deed made by the wife alone (2).

It is provided by the Married Woman's Conveyances Act, R.S.O. 1914, c. 150, ss. 5 and 6, as follows:

5 Where a conveyance to a purchaser for value purporting to bar or release dower in any land was before the 5th day of May

(1) R.S.O. 1914, c. 117, schedule B, clause 1.

(2) See chapter 35, *Short Forms of Mortgages Act*, §381.

(3) See the Married Woman's Conveyances Act, R.S.O. 1914, c. 150, ss. 5 and 6, quoted in chapter 2, *Mortgage at Common Law*, §16.

1894, executed by a wife entitled to an inchoate right of dower, and such wife was at the time of such execution under age, but the purchaser had at or before the execution of the conveyance and payment of the purchase money no notice that she was under age, the conveyance shall be effectual to bar her dower unless prior to the 1st day of January, 1899, she had brought an action for dower or had given to the owner of the land written notice of her claim to dower by reason of her minority; but nothing in this section shall affect any conveyance which prior to the 31st day of December, 1897, became valid under the Act passed in the fifty-ninth year of the reign of Her late Majesty Queen Victoria intitled *An Act relating to Dower in Certain Cases*.

6. Subject to the provisions of *The Land Titles Act* a married woman, under twenty-one years of age, of sound mind, might on and since the 5th day of May, 1894, have barred and hereafter may bar her dower in any land by joining with her husband in a deed or conveyance thereof to a purchaser for value, or to a mortgagee in which deed or conveyance a release or bar of her dower is contained, and she may in like manner release her dower to any person to whom such land has been previously conveyed.

It is provided by the Dower Act, R.S.O. 1914, c. 70, ss. 9, 13 to 20, as follows:

9. Where a wife willingly leaves her husband and goes away, and continues with her adulterer, she shall be barred forever of her action to demand her dower that she ought to have of her husband's land, unless her husband willingly and without coercion be reconciled to her, and suffer her to dwell with him; in which case she shall be restored to her action. 13 Ed. I. (St. of Westminster 2nd), c. 34 (o).

13. Where a person whose wife is a lunatic and confined as such in a provincial hospital for the insane in Ontario, has heretofore, while his wife was so confined, become the owner of land or hereafter while she is so confined becomes the owner of land, he may sell and convey or mortgage such land, freed and discharged of any claim of his wife for dower therein, but no such conveyance or mortgage shall be made after the discharge of his wife from the hospital.

14. - (1) Where the wife of an owner of land

(a) has been living apart from him for two years under such circumstances as disentitle her to alimony (p); or

(o) Cf. s. 14, *infra*

(p) See re Tolhurst, 1906, 12 O.L.R. 45, Re S., 1907, 14 O.L.R. 536, and cases cited

(b) Is a lunatic or of unsound mind and confined as such in a hospital for the insane,

and such owner is desirous of selling or mortgaging the land free from dower, a Judge of the Supreme Court, or a Judge of the county or district court of the county or district in which such owner resides, on application by him may, by an order to be made in a summary way, upon such evidence as to the Judge may seem meet, and upon notice to be served personally unless the Judge otherwise directs, dispense with the concurrence of the wife for the purpose of barring her dower.

(2) The Judge shall, unless the wife has been so living apart from her husband under such circumstances as disentitle her to dower, ascertain and state in the order the value of such dower, and shall by the order direct that the amount thereof shall remain a charge upon the land or be secured otherwise for the benefit of the wife or be paid or applied for her benefit as he may deem best.

(3) After the making of an order a conveyance or mortgage by the owner, expressed to be free from his wife's dower, shall, subject to the terms and conditions mentioned in the order, be sufficient to bar her right thereto.

(4) This section shall extend to any case in which an agreement for sale has been made, or a conveyance executed by the husband, and part of the purchase money retained by the purchaser on account of dower or an indemnity given against such dower, and in any such case the application may be made by any person interested in the land, the purchase money retained, or the indemnity.

(5) Where the wife is an infant or a person of unsound mind notice of the application shall be served on the Official Guardian, except where such person is confined in any provincial hospital for the insane, in which case the notice shall be served on the Inspector of Prisons and Public Charities.

(6) On every such application the Judge shall be entitled to his own use to a fee of \$5, and no other fee or charge of any kind shall be payable in respect thereof, except that for filing the affidavits and reports the proper officer shall charge the same fees as for filing papers in other cases, which in the Supreme Court shall be paid in law stamps.

15. (1) Where the legal surgeon of a county or district in which a married woman, who is not confined in a hospital for the insane, resides, and another medical practitioner to be named by the Judge, each certifies, Form 1, that he has personally examined such married woman and that he is of opinion that she is sane, and a Judge of the county or district court of the county or district in which such married woman resides, or a Judge of the Supreme Court, each certifies, Form 2, that he has personally examined such married woman, and that from such examination and

from the evidence adduced before him, if he thinks it expedient to hear evidence, he is of opinion that such married woman is insane, the Judge may make the like order as by the next preceding section is authorized

(2) The examination and certificates required by this section shall not be acted upon by the Judge unless all are made within a period of one month, and the application shall not be entertained unless it is made within one month after the day upon which the last of such examinations took place.

16. Where a Judge makes an order under either of the next preceding two sections, with reference to any parcel of land, he may afterwards make orders in respect of other sales or mortgages by the husband, on the evidence adduced on the first application, and on other evidence which may satisfy him of the continued insanity of the wife.

17.--(1) Where the wife of an owner of land has been living apart from her husband for five years or more, and the husband sells and conveys, or has sold and conveyed the land, or mortgages, or has mortgaged the same, the wife not having joined in the conveyance or mortgage, and the purchaser or mortgagee not having had notice that the grantor or mortgagor had a wife living at the time, such purchaser or mortgagee may during the lifetime of the grantor or mortgagor apply to a Judge of the Supreme Court or to a Judge of the county or district court of the county or district in which he resides for an order enabling him to convey or mortgage the land free from the dower of such wife, which may be obtained subject to the like conditions, and by the like proceedings, as are provided by section 14.

(2) A person claiming under the grantee or mortgagee shall be entitled to apply in like manner and obtain like relief founded on the right which such grantee or mortgagee had, or on the applicant's own interest having been acquired by purchase for value in good faith without notice that such owner had a wife at the time of the conveyance or mortgage.

18.--(1) An order under any of the preceding sections may be made in duplicate, or in as many parts as are necessary, and shall be signed by the Judge, and may be registered in the registry office of the registry division wherein the land to which the same relates is situate, upon its production and deposit, without any proof thereof; and such registration may take place either before or after the execution of the conveyance or mortgage made in pursuance of such order

(2) The order may be endorsed or written upon the conveyance or mortgage, in which case it shall be registered as part thereof

(3) For the registration of the order including all necessary

entries and certificates, the registrar shall be entitled to a fee of \$1, unless the order is endorsed or written upon the conveyance or mortgage, in which case no fee shall be payable in respect of the registration thereof.

(4) If the order is endorsed or written upon the conveyance or mortgage the land may be described in the order by reference to the description contained in the conveyance or mortgage.

19. (1) No action of dower shall lie where the dowress has joined in a deed to convey the land, or to release her dower therein, to a purchaser for value, though the acknowledgment required by law at the time may not have been made or taken, or though there may have been an informality in the making, taking or certifying such acknowledgment.

(2) Nor shall an action of dower lie where a husband before the 2nd day of March, 1877, duly conveyed land of which he was owner, and his wife before that day executed a deed or conveyance for the purpose of barring her dower, notwithstanding her husband was not a party to such deed or conveyance, and the deed or conveyance shall be taken and adjudged to be valid and effectual to have barred her dower in the lands in which such deed or conveyance professed to bar dower, notwithstanding the absence or want of a certificate touching her consent to be barred of her dower, and notwithstanding any irregularity, informality or defect in the certificate, if any, and notwithstanding that such deed or conveyance may not have been executed, acknowledged or certified, as required by any Act on or before such day in force, respecting the barring of dower.

20. Where a wife has joined or hereafter joins in a conveyance or mortgage purporting to convey or mortgage land, or has signed or signs, otherwise than as a witness, a conveyance or mortgage by which her husband conveys or mortgages or purports to convey or mortgage land, but the conveyance or mortgage contains no words purporting to release her dower or other estate or interest in the land, the conveyance or mortgage shall have the same effect as if it contained a bar of dower by the wife and she thereby barred her dower in the land, but as to conveyances and mortgages executed before the 16th day of April, 1895, this section shall not be construed as prejudicing or affecting the rights of third persons claiming the land or some interest therein under a subsequent conveyance or mortgage executed by the wife before the said 16th day of April, 1895, containing a conveyance or release of her dower or other estate or interest.

The provision of s. 20 was enacted in 1895 by the statute 58 V. c. 25, ss. 1, 2, in consequence of a decision that where a mortgage did not contain a bar of dower, though the wife was

a party to and executed the mortgage, the instrument should not be reformed by the insertion of a bar of dower, there being no consideration to support a contract by the wife with the mortgagee to bar her dower (*q*).

Dower may be barred by jointure, as regulated by the Statute of Uses (*r*), or by ante-nuptial settlement in lieu of dower (*s*).

A conveyance to a husband may be so drawn that the husband may convey the land and defeat dower. Thus, a conveyance may be made to a third person to such uses as the husband (the real purchaser) shall appoint, and in default of and till appointment to the use of the husband in fee. Under such limitations dower attaches, subject to be divested on exercise of the power of appointment (*t*).

§176. *Tenancy by the curtesy.*

Tenant by the curtesy of England is where a man's wife is seised of an estate of inheritance, that is, of lands and tenements in fee simple or fee tail, and he has, by her, issue born alive capable of inheriting her estate. In this case, on the death of his wife, he holds the lands for his life as tenant by the curtesy of England. There are four requisites necessary to make a tenant by the curtesy—marriage, seisin of the wife, issue, and death of the wife (*u*).

(*q*) *Bellamy v. Badgerow*, 1893, 24 O.R. 278.

(*r*) 27 H. 8 c. 10, ss. 4, 5 and 7, re-enacted as R.S.O. 1897, c. 331, ss. 5, 6 and 7, (R.S.O. 1914, appendix A.)

(*s*) For a discussion of these two modes of barring dower, see Armour, *Real Property*, 2nd ed., pp. 111-113.

(*t*) See Armour, *Real Property*, 2nd ed., p. 114, where the operation of this mode of conveyance is explained. It is there pointed out that there has been much conflict of opinion as to the efficacy, for the purpose of defeating dower, of a conveyance direct to the husband in fee to such uses as he shall appoint, and until appointment to him in fee, without the intervention of a third person as grantee to uses.

(*u*) See Armour, *Real Property*, 2nd ed., pp. 99 ff., where these requisites are discussed.

In Manitoba, Saskatchewan, Alberta, and the Northwest Territories tenancy by the curtesy has been abolished.

At common law the husband of a mortgagor, even though he might have a tenancy by the curtesy upon his wife's death, but so long as the mortgage was not in default the husband's claim to curtesy was liable to be defeated by the payment of the mortgage, and after default, so long as the equity of redemption existed, equity would restrain him from asserting his legal right (*xx*). On the other hand it was held that where a wife was mortgagor she had such a seisin of the land that upon her death her husband was entitled to curtesy (*x*), although in the analogous case of a husband being mortgagor the wife was not at common law entitled to dower because her husband was not seised (*xy*).

It is provided in Ontario by the Married Women's Property Act, R.S.O. 1914, c. 149, s. 6, sub-s. 4, as follows:

(1) The real estate of any woman married after the 2nd day of March, 1872, whether owned by her at the time of her marriage or acquired by her in any way after marriage, and the rents, issues, and profits thereof respectively, shall, without prejudice and subject to the trusts of any settlement affecting the same, be held and enjoyed by her for her separate use, free from any estate therein of her husband during her lifetime, and from his debts and obligations and from any claim or estate by him, as tenant by the curtesy, and her receipt alone shall be a discharge for any rents, issues and profits of the same; but nothing herein contained shall prejudice the

(xx) R.S.M. 1912, c. 54, s. 20; R.S.S. 1906, c. 47, s. 22; Alta. Statutes 1906, c. 49, s. 6; P.S.C. 1906, c. 11, s. 14.

(x) Cf. Lat. 206, and note; Strahan, *Law of Mortgages*, 2nd ed. p. 418. As to dower in the mortgagee's legal estate, cf. §171, *supra*.

(xy) *Casborne v. Scarle* (1737, 1 A.K. 607) (W & T.L.C. Eq.). As to the dictum in this case that an equity of redemption is an estate in the land, see chapter 3, *Legal Mortgage in Equity*, §28.

(yy) See §171, *supra*. As pointed out in Lewin, *Law of Trusts*, 12th ed. p. 948, as dower and curtesy stand exactly on the same footing upon principle, either the rejection of dower or the admission of curtesy was an anomaly.

right of the husband as tenant by the curtesy in any real estate of the wife which she has not disposed of *inter vivos* or by will.

It is provided in Ontario by the Conveyancing and Law of Property Act, R.S.O. 1914, c. 109, s. 28, as follows:

28 Where a husband has issue born alive and capable of inheriting any land to which his wife is entitled in fee simple, or fee tail, if the husband survive his wife, whether such issue live or not the husband shall, subject to the provisions of *The Married Women's Property Act*, be entitled to an estate for his natural life in such land as may not have been disposed of by her deed or will; but if he has no such issue by his wife he shall not be entitled to any further or other estate or interest in such land in the event of surviving his wife, except such as may be devised to him by her will, or such as he may become entitled to under *The Devolution of Estates Act*.

The Married Women's Property Act and the Married Woman's Conveyances Act enable a married woman to dispose of her real and personal property as if she were a *feme sole* (2), and she may defeat her husband's tenancy by the curtesy by disposing of her land in her lifetime or by her will (a).

The Devolution of Estates Act, R.S.O. 1914, c. 119, s. 29, provides as follows:

29. (1) The real and personal property, whether separate or otherwise, of a married woman in respect of which she dies intestate, shall be distributed as follows: One-third to her husband if she leaves issue, and one-half if she leaves no issue, and subject thereto shall devolve as if her husband had pre-deceased her.

(2) A husband who, if this Act had not been passed, would be entitled to an interest as tenant by the curtesy in real property of his wife, may, by deed or instrument in writing executed, and attested by at least one witness, and delivered to the personal representative, if any, or if there is none, deposited in the office of the Surrogate Clerk at Toronto, within six months after his wife's death, elect to take such interest in the real and personal property of his wife as he would have taken if this Act had not been passed, in which case the husband's interest therein shall be ascertained in all respects as if this Act had not been passed, and he shall be entitled to no further interest thereunder.

(2) See some of the provisions of the statutes quoted in chapter 2, *Mortgage at Common Law*, §16.

(a) *Moore v. Jackson*, 1893, 22 Can. S.C.R. 210, at pp. 223, 235, 238.



PART V.

EXTINGUISHMENT OF MORTGAGE.

CHAPTER XIX.

DISCHARGE OR RECONVEYANCE.

- §181. Revesting of estate on payment of mortgage, p. 299.
- §182. Obligation of mortgagee to reconvey, p. 301.
- §183. Statutory form of discharge, p. 303.
- §184. Effect of discharge when registered, p. 308.
- §185. Discharge in case of death of mortgagee, p. 314.
- §186. Vesting order, p. 317.
- §187. Discharge under the Land Titles Acts, p. 321.

§181. *Revesting of estate on payment of mortgage.*

It is customary in Ontario to insert in a mortgage the short form of defeasance clause contained in the Short Forms of Mortgages Act (a), as follows:

Provided this mortgage to be void on payment of
of lawful money of Canada, with interest at..... per cent., as
follows:
and taxes and performance of statute labour.

If the mortgage is expressed to be made in pursuance of the statute a proviso in the foregoing form has the same effect as if it were in the following terms (b):

Provided always, and these presents are upon this express condition, that if the said mortgagor, his heirs, executors, administrators or assigns, or any of them, do and shall well and truly pay or cause to be paid unto the said mortgagee, his executors, administrators or assigns, the just and full sum of
of lawful money of Canada, with interest thereon, at the rate of

(a) R.S.O. 1914, c. 117, schedule B, clause 2.

(b) See chapter 35, *Short Forms of Mortgages Act*, §381.

.....per cent. per annum, on the days and times, and in manner following, that is to say..... without any deduction, defalcation or abatement out of the same for or in respect of any taxes, rates, levies, charges, rents, assessments, statute labour, or other impositions whatsoever already rated, charged, assessed or imposed or hereafter to be rated charged, assessed or imposed by authority of Parliament or of the Legislature, or otherwise howsoever, on the said lands and tenements, hereditaments and premises with the appurtenances, or on the said mortgagee, his heirs, executors, administrators or assigns, in respect of the said premises, or of the said money or interest, or any other matter or thing relating to these presents, and until such default as aforesaid shall and will well and truly pay, do and perform or cause or procure to be paid, done and performed, all matters and things in this proviso hereinbefore set forth, then these presents and everything in the same contained shall be absolutely null and void.

Where a mortgage contains a defeasance clause or proviso that it shall become void on payment of the mortgage money, then, if payment is made strictly in accordance with the proviso (c), the estate will without reconveyance or release become revested in the mortgagor, or become vested in such other person as is entitled to it by assignment or subsequent mortgage from the mortgagor, as the case may be.

If, however, the condition of the mortgage is broken by default in payment or otherwise, payment thereafter will not divest the mortgagee of his title, and a reconveyance or release of the estate will be necessary. The fact that notwithstanding the default the mortgagor may have an equitable right to redeem (*d*) does not affect the legal estate in the land. The legal estate, having been conveyed to the mortgagee, remains in him if the event upon which it was to revest does not happen (*e*). The mortgagor who has paid, but not

(*c*) The mortgagee is not obliged to accept payment before the time appointed for payment in the mortgage. See chapter 25, *Action for Redemption*, §252. If, however, he accepts payment in advance, the defeasance clause will operate to revest the estate.

(*d*) See chapter 3, *Legal Mortgage in Equity*, §22.

(*e*) See chapter 2, *Mortgage at Common Law*, §12.

strictly in accordance with the terms of the mortgage, must, in order to enable the mortgagee to reconvey, resort to the equitable jurisdiction of the court (f).

An effectual release of a debt, whether express or implied from conduct, discharges all securities for the same, whether original or collateral in the hands of the creditor, but (except as above stated) reconveyance is necessary to revest the legal estate in the mortgagor (g). The mortgagee's legal estate will, however, be extinguished if the mortgagor remains in adverse possession for the statutory period (h).

§182. *Obligation of mortgagee to reconvey.*

Except in the case of payment being made strictly in accordance with the terms of a mortgage and the estate being revested by virtue of a defeasance clause in the mortgage, a reconveyance is necessary at common law to divest the mortgagee of the estate conveyed to him by the mortgage (i).

In the simple case of a mortgagor, absolutely entitled to the equity of redemption, who pays off a mortgage, the mortgagee is bound to reconvey the estate to him (j). If, however, the mortgagor has assigned his equity of redemption either absolutely or by way of subsequent mortgage, the mortgagee is bound to reconvey not necessarily to the mortgagor but to the person best entitled to the equity of redemption.

(f) See §182, *infra*.

(g) *Harrison v. Owen*, 1738, 1 Atk. 520, 18 R.C. 564; *Cowper v. Green*, 1841, 7 M. & W. 633, 18 R.C. 564.

(h) See chapter 26, *Limitation of Actions*, §276.

(i) See §181, *supra*. As to the general principle that the mortgagee is not entitled to enforce payment unless he is in a position to reconvey the mortgaged property, see chapter 23, *Action on the Covenant*, §227.

(j) *Walker v. Jones*, 1866, L.R. 1 P.C. 50, at p. 61. The mortgagor is entitled to insist that the title deeds and the reconveyance be delivered to him at the time of the payment of the money. *Rourke v. Robinson*, [1911] 1 Ch. 480.

that is to say, to the first subsequent mortgagee, if any, otherwise to the owner of the equity of redemption (*k*).

Where there are several mortgagors the mortgagee must reconvey so as to revest the title in all, and if he reconvey to one of several mortgagors he will be liable at the suit of the other mortgagors for any loss they may sustain thereby (*l*).

If the mortgagee has lost the mortgage deed he is bound at his own expense to furnish the mortgagor or any encumbrancer who redeems with proof of the loss and with an indemnity against any demand by third persons (*m*).

Where a sub-mortgage has been made, both the mortgagee and the sub-mortgagee must convey (*n*).

In the case of a mortgage by way of conveyance with a proviso for reconveyance on payment of money upon a specified date, if the mortgagor pays on the specified date equity will decree specific performance of the contract for reconveyance (*o*). If, on the other hand, the mortgagor fails to pay on the specified date his contractual right to a reconveyance is forfeited, but in ordinary circumstances he will nevertheless be allowed in equity to redeem (*p*), and on payment will be entitled to a reconveyance.

The mortgagor or other person redeeming is not entitled to any covenant from the mortgagee except the usual covenant against incumbrances (*q*).

(*k*) *Teevan v. Smith*, 1882, 20 Ch.D. 724, at pp. 729-730. See chapter 20, *Right to Assignment of Mortgage*, §§191 and 192.

(*l*) *Magnus v. Queensland National Bank*, 1888, 37 Ch.D. 466.

(*m*) *McDonald v. Hime*, 1868, 15 Gr. 72.

(*n*) *Lysaght v. Westmacott*, 1864, 33 Beav. 417; 21 Halsbury, *Laws of England*, p. 309.

(*o*) *Kreglinger v. New Patagonia, etc., Co.*, [1914] A.C. 25, at p. 47.

(*p*) See chapter 3, *Legal Mortgage in Equity*, §22.

(*q*) *Gooderham v. Traders Bank*, 1888, 16 O.R. 438.

Leaseholds were mortgaged by a sub-demise for the residue of the original term except the last day. Afterwards by another mortgage they were sub-demised to a second mortgagee for the residue of the original term except the last day, subject to the first mortgage. The second mortgage was paid off during the continuance of the first mortgage and the mortgage deed was handed back to the mortgagor. A purchaser of the leaseholds from the mortgagor declined to complete without a formal surrender being obtained of the term created by the second mortgage. It was held that by the second mortgage there was vested in the mortgagee a legal term which was not determined or re-vested in the mortgagor by mere repayment of the principal money and interest, and that the purchaser was entitled to require a surrender or assignment of the outstanding term created by the second mortgage (r).

§183. *Statutory form of discharge.*

It is provided in Ontario by the Registry Act R.S.O. 1914, c. 124, s. 62, as follows:

62. In the case of a registered mortgage the registrar on receiving a certificate, Form 10, executed by the mortgagee, his executors, administrators or assigns, [or by such other person as may be entitled by law to receive the money and to discharge the mortgage], and duly proven in the manner required for the proof of other instruments, shall register the same, and record it and every affidavit attached to or endorsed on it, at full length in the proper order, in the registry book, and number it in like manner as other instruments are required to be registered, recorded and numbered.

Except as to the words enclosed within square brackets (s) this section in its present form was first enacted in 1911 by the statute 1 G. 5, c. 17, s. 31 (t), but the legislation with regard

(r) In re Moore and Hulm's Contract, [1912] 2 Ch. 105.

(s) These words were added in 1918 by 8 G. 5, c. 27, s. 8.

(t) As to the wording of the section prior to 1911, and as to the person entitled to sign a discharge, see §184.

to discharges of mortgages as a means of reconveyance began in 1834 with the statute 4 W. 4, c. 16 (u).

The form of discharge referred to in s. 62 is as follows:

To the Registrar of the Registry Division of
I, ... of do certify that
has satisfied all money due on, or to grow due on (or has satisfied
the sum of \$..... mentioned in), a certain mortgage made by
..... of to which mortgage
bears date the day of 19 .., and was registered
in the Registry Office for the Registry Division of on
the day of 19 .., at minutes past
..... o'clock, ... noon, in Book for as No.
(here mention the date and the date of registration of each assign-
ment thereof, and the names of the parties, or mention that such
mortgage has not been assigned, according to the fact), and that I
am the person entitled by law to receive the money, and that such
mortgage (or such sum of money as aforesaid, or such part of the
land as is herein particularly described, that is to say:)
is therefore discharged.

Witness my hand this day of 19 ..

Witness: }

It is further provided by the Registry Act, ss. 63-66, as follows:

63. Where a loan corporation which has acquired the assets of another loan corporation by amalgamation of such corporation and the certificate of such amalgamation has been registered desires to discharge any of the mortgages of such corporation it shall be sufficient to set forth in the instrument to be registered the fact of the assent of the Lieutenant-Governor in Council to such amalgamation with the date of the certificate of amalgamation and its registered number in the registry division in which the land affected is situate, or mentioning the Act by which the loan corporations were amalgamated or by which the agreement was ratified, and upon registration of the discharge the registrar shall enter in the abstract index the facts mentioned in the discharge.

64.—(1) Where a mortgage has been paid off by any person advancing money by way of a new loan on mortgage on the same land and the mortgage so paid off or the discharge thereof is held

(u) See chapter 4, *Law and Equity in Upper Canada*, §33, and *infra*, §184.

by the mortgagee making the new loan, the discharge of the mortgage so paid off shall be registered within six months from the date thereof, unless the mortgagor shall, in writing, have authorized the retention of the discharge for a longer period.

(2) The registration shall not affect the right, if any, of the mortgagee who may have paid off such mortgage, his assignee, or any person claiming under him by purchase or otherwise, to be subrogated to the rights of the mortgagee whose mortgage debt has been so paid (r).

45 (1) Where the person entitled to receive the mortgage money and to discharge a registered mortgage is not the original mortgagee, he shall, at his own expense, cause to be registered before the registration of the certificate of discharge all the instruments or documents through which he claims interest in and title to the mortgage money, and until such instruments or documents are registered the registrar shall not register such certificate of discharge.

(2) The certificate shall mention the date and the date of registration and the registration number of each of the instruments or documents through which the person executing the certificate claims interest in and title to the mortgage money, and the names of the parties thereto.

(3) This section shall apply to powers of attorney where the certificate of discharge or prior instrument or document is executed by attorney, provided that it shall be sufficient in the certificate of discharge to state the date of each instrument, document or power of attorney and the names of the parties thereto, and to endorse on the certificate the date of registration and registration number of each instrument, document, or power of attorney, which endorsement shall be signed by the person who signed the certificate, or his attorney or agent, and the endorsement shall be deemed to be part of the certificate.

(4) Where probate of will or letters of administration with the will annexed is required to be registered under this section, and the will is over seven folios in length, including the probate or letters, and does not affect land in the registry division, except in so far as the testator was the holder of a mortgage, it shall not be necessary to record the will at full length; but it shall be sufficient to deposit a copy of and record so much of the probate or letters as shows the grant of probate or letters and the appointment of executors and administrators.

(5) The copy shall be accompanied by an affidavit of the executors or administrators, or of one of them, or of his or their solicitor, verifying it and stating that there is nothing in the will limit-

(r) As to the right of subrogation, see chapter 8, *The Registry Act*, §78.

ing the right of the executors or administrators to receive the mortgage money and discharge the mortgage, and that the will does not affect land in the registry division in which the probate or letters is to be registered, except in so far as the testator was the holder of a mortgage comprising land in such registry division.

(6) Where the person whose duty it is to register such instruments or documents refuses or neglects to register the same within fifteen days after the payment of the mortgage money to him, the person entitled to redeem the mortgage may, on giving ten days' notice in writing to the person so refusing or neglecting, apply in a summary manner to a Judge of the County or District Court of the county or district wherein the land or any part thereof mentioned in the mortgage is situate for an order directing that the person so refusing or neglecting shall within a time to be fixed by the Judge, register such instruments or documents at his own expense, and the Judge, upon being satisfied by affidavit or oral evidence that the application is a proper one, may make the necessary order.

(7) On being satisfied of the due service of the notice the Judge may proceed in the absence of the person so refusing or neglecting.

(8) The notice shall state that it is given in pursuance of this section.

60. (1) Where the holder of a mortgage desires to release or discharge part of the land comprised in it, or to release or discharge part of the money secured by the mortgage, he may do so by deed or by certificate to be made, executed, proven, and registered in the same manner and with the like effect to the land or money released or discharged as when the whole land and mortgage are released and discharged (*w*).

(2) The deed or certificate shall contain as precise a description of the land released or discharged as is required in an instrument of conveyance for registration, and also a precise statement of the particular sum so released or discharged.

The certificate of discharge, not containing words of conveyance and being an instrument that operates as a conveyance only by virtue of the statute, should conform with reasonable strictness thereto (*x*).

Prior to the 29th day of March, 1873, it was necessary that

(*w*) See *In re Ridout*, 1853, 2 U.C.C.P. 477.

(*x*) It is, however, provided by the Interpretation Act, R.S.O. 1914, c. 1, s. 28 (d), that "where forms are prescribed, deviations therefrom not affecting the substance or calculated to mislead, shall not violate them," unless the contrary intention appears.

the residence and occupation of the attesting witness to the certificate of discharge should be stated in the attestation clause (y). But since that date it has been unnecessary to state the residence and occupation of the witness in the attestation clause, and certificates registered before that date are not invalid by reason of their being omitted (z). The affidavit of execution of a certificate of a discharge of mortgage should set forth the name of the witness, his place of residence and addition, occupation or calling, but an instrument may be registered notwithstanding that the Christian name or names of the subscribing witness making the affidavit is or are set forth therein by initials or abbreviation and not in full (a).

A mortgagee executed a statutory discharge which was incorrectly dated, and his agent in good faith and in order to make the instrument conform to the intention of the mortgagee altered the date. The alteration was, under the circumstances, immaterial, and the document as altered stated correctly what was intended by the parties. The discharge was held to be valid (b).

In case of the registration of an instrument amounting to an equitable mortgage or charge, which is or purports to be given as a security for the payment of a debt or liability incurred in respect of a purchase or delivery of goods or in respect of an advance or loan of money, but not purporting to convey the land, the instrument may be discharged and the land affected thereby released by the registration of a certificate of discharge (c).

y) 31 V. c. 20, s. 60, form J

z) R.S.O. 1897, c. 136, s. 84

(a) R.S.O. 1914, c. 124, s. 35.

(b) Sayles v. Brown, 1880, 28 Gr. 10.

(c) R.S.O. 1914, c. 124, ss. 36, 69, and form 12. The form is similar to form 10, quoted above.

A married woman may execute a discharge of mortgage (d).

A sheriff or other officer who seizes a mortgage under a writ of execution or warrant and receives payment of the mortgage money may execute a discharge of the mortgage (e).

§184. *Effect of discharge when registered.*

It is provided in Ontario by the Registry Act, R.S.O. c. 124, s. 67, as follows (f) :

67. Every certificate of payment or discharge of a mortgage or of the conditions therein or of the lands or any part thereof, by the mortgagee, his executors, administrators or assigns at any time given, and whether before or after the time limited by the mortgage for payment or performance, if in conformity with this Act, shall, when registered, be a discharge of the mortgage or of the lands in such certificate described, as the case may be, and shall be as valid and effectual in law as a release of the mortgage or of such lands and as a conveyance to the mortgagor, his heirs or assigns of the original estate of the mortgagor therein.

S. 67 was first enacted in its present form in 1911 by the statute 1 G. 5, c. 17, s. 31. Prior to that time it and the pre-

(d) R.S.O. 1914, c. 159, s. 3, quoted in chapter 3, *Mortgage at Common Law*, §16.

(e) R.S.O. 1914, c. 124, s. 68, quoted in chapter 12, *Execution Creditors of the Mortgagee*, §10.

(f) In 1834 the statute 4 W. 4, c. 16, provision was made in Upper Canada for the registration of a discharge of mortgage. By that statute it was provided that the discharge when registered should have the effect of defeating any title remaining vested in the mortgagee but not any other title. See chapter 4, *Law and Equity in Upper Canada*, §33. In 1865, by the statute 29 V. c. 24, it was declared that the discharge when registered should operate as a reconveyance to "the mortgagor, his heirs, executors, administrators, or assigns," and in 1867, by the statute 31 V. c. 20, these words were added, "or any person lawfully claiming by, through or under him or them." Noble v. Noble, 1912, 27 O.L.R. 342, at p. 355. As to the history of the legislation with regard to discharges of mortgage, see also Dilke v. Douglas, 1880, 5 O.A.R. 63, at p. 70.

decessor of the present s. 62 (*g*) formed following terms (*h*):

62. In the case of a registered mortgage, the registrar on receiving a certificate, Form 10, executed by the mortgagee, or if the mortgage has been assigned, then by the assignee, or by such other person as may be entitled by law to receive the money and to discharge the mortgage, and duly proven in the manner provided for the proof of other instruments, shall, if the assignment or other document of title of the assignee or other person executing the certificate has been registered, register the same, and record it and every affidavit attached to or endorsed on it, at full length in the proper order, in the registry book, and number it in like manner as other instruments are required to be registered, recorded and numbered, and the certificate when registered shall be a discharge of the mortgage, and shall be as valid and effectual in law as a release of the mortgage, and as a conveyance to the mortgagor, his heirs, executors, administrators, or assigns, or any person lawfully claiming by, through or under him or them, of the original estate of the mortgagor.

It will be observed that under the former s. 62 a discharge might be executed by the mortgagee, or if the mortgage had been assigned, then by the assignee, or by such other person as might be entitled by law to receive the money and to discharge the mortgage, whereas under the present s. 67 a discharge must be executed by the mortgagee, his executors, administrators or assigns (*i*). Again, under the former s. 62 a discharge when registered operated as a conveyance to the mortgagor, his heirs, executors, administrators, or assigns, or any person lawfully claiming by, through or under him or them, of the original estate of the mortgagor, whereas under the present s. 67 it operates as a conveyance to the mortgagor,

(*g*) See §183, *supra*.

(*h*) 10 E. 7, c. 60, s. 62, re-enacting R.S.O. 1897, c. 136, s. 76, as amended by 7 E. 7, c. 29, s. 9.

(*i*) In 19 the present s. 62 was amended by the addition after the word "assigns" of the words "or by such other person as may be entitled by law to receive the money and to discharge the mortgage," but no similar change was made in s. 67 which alone declares what is to be the effect of a discharge when registered. As to the result of the omission, see §185, *infra*.

his heirs or assigns of the original estate of the mortgagor therein (*j*).

Where a discharge was executed under a power of attorney which authorized the attorney to sell the principal's lands, execute deeds and give receipts for the consideration money, and upon payment of all or any debts, to give proper and lawful acquittances and discharges for the same, it was held that the attorney had sufficient authority to execute the statutory form of discharge (*k*).

It would appear that a certificate of discharge is inoperative to revest the lands unless the mortgage is registered (*l*).

The object of the enactment as stated by Lord Halsbury in construing a similar statute in England "was to get rid of conveyancing formalities and to make the receipt given under the statute to operate as though it were a conveyance" (*m*).

A certificate of discharge of mortgage operates as a reconveyance, not upon its execution and delivery, but only upon registration (*n*). So where a certificate of discharge was lost before registration it was held that the disclaimer of the mortgagees, who were trustees, and the consent of their solicitors were not sufficient to enable the court to declare the petitioner entitled to the legal estate in fee simple (*o*). Before registration the discharge is a mere receipt or acknowl-

(*j*) The present s. 67, in addition, contains the words "at any time given, and whether before or after the time limited by the mortgage for payment or performance, if in conformity with this Act." These words are taken from s. 12 of the Act respecting Mortgages of Real Estate, R.S.O. 1897, c. 136, (see §185), which has been omitted from the present Mortgages Act.

(*k*) *Lee v. Morrow*, 1866, 25 U.C.R. 604.

(*l*) R.S.O. 1914, c. 124, ss. 62, 67.

(*m*) *Hosking v. Smith*, 1888, 13 App. Cas. 582, at p. 585.

(*n*) *Trust and Loan Company v. Gallagher*, 1879, 8 O.P.R. 97; *In re Music Hall Block, Dumble v. McIntosh*, 1884, 8 O.R. 225.

(*o*) *Re Moore*, 1878, 8 O.P.R. 471.

edgment of the payment of money (*p*): and if not under seal is not an estoppel as to the fact of payment (*q*).

When the discharge has been registered, it operates as a conveyance, according to the words of the section, of the original estate of the mortgagor, whatever that was, and does not give a new estate derived from the mortgagee (*r*).

As a mortgage in fee simple executed by a tenant in tail operates to vest the fee simple in the mortgagee it was thought that the registration of a discharge of such a mortgage would only re-vest an estate tail as being the original estate of the mortgagor (*s*), but it has been held that the discharge in such case has the effect of reconveying the land in fee simple (*t*).

A mortgagor or other person entitled to the equity of redemption has a right to obtain at his own expense from the mortgagee a reconveyance of the mortgaged premises, including a covenant against incumbrances. He is not obliged to accept the simple discharge of mortgage prescribed by the statute (*u*). The purchaser of a mortgaged estate paid the amount due on the mortgage to the mortgagee, who executed a statutory discharge of the incumbrance, which recited that the money due upon the mortgage had been paid by the mortgagor, and refused either to sign a discharge stating correctly the name of the purchaser as the person paying, or to execute a reconveyance in his favour, although the purchaser offered to furnish satisfactory proof, if desired, that he was the owner of the equity of redemption. The court, on a bill filed for that

(*p*) *Dilke v. Douglas*, 1880, 5 O.A.R. 63, at p. 70.

(*q*) *Bigelow v. Staley*, 1864, 14 U.C.C.P. 276.

(*r*) *Carter v. Grasett*, 1888, 14 O.A.R. 685.

(*s*) *Re Dolsen*, 1872, 4 U.C. Chy. Ch. 36; *Lawlor v. Lawlor*, 1881, 6 O.A.R. 312.

(*t*) *Lawlor v. Lawlor*, 1882, 10 Can. S.C.R. 194.

(*u*) *McLennan v. McLean*, 1879, 27 Gr. 54.

purpose, ordered the mortgagee to execute the reconveyance, and pay the costs of the suit (*v*).

It is immaterial whether the name of the mortgagor, or of the person satisfying the mortgage, is inserted in the certificate, or whether the name is altogether omitted (*w*). Upon registration of the discharge the estate will vest, not necessarily in the person whose name is inserted in the certificate, or in the person paying off the mortgage, but in the person who is entitled to the legal estate or who has the best right to call for it (*x*).

Thus a mortgagor in his lifetime paid part of the mortgage moneys, and after his death his widow paid the remainder on behalf of his estate. The discharge recited that the mortgagor had satisfied the moneys due on the mortgage. It was held that the estate vested in the heirs-at-law, and that the misrecital was of no consequence (*y*).

Where a mortgagor conveyed the equity of redemption subject to a mortgage, a discharge of which was registered on the same day as the deed, it was held that the deed must be assumed to have been delivered before it was registered, and the discharge of the mortgage on registration operated as a reconveyance to the assignee of the mortgagor within the meaning of the act (*z*).

In some circumstances where a person pays off an existing first mortgage and registers a discharge of it, he may be entitled to be subrogated to the position of the first mortgagee

(*v*) *McLennan v. McLean*, *supra*.

(*w*) *McLennan v. McLean*, *supra*; *Carriek v. Smith*, 1874, 35 U.C.R. 348.

(*x*) *Hosking v. Smith*, 1882, 13 App. Cas. 582; *Robinson v. Trevor*, 1883, 12 Q.B.D. 423; *Fourth City Mutual Benefit Building Society v. Williams*, 1879, 14 Ch.D. 140; *Crosbie-Hill v. Sayer*, [1908] 1 Ch. 866.

(*y*) *Carriek v. Smith*, 1874, 35 U.C.R. 348.

(*z*) *Imperial Bank of Canada v. Metcalfe*, 1886, 11 O.R. 467.

as being the person best entitled to call for the legal estate in priority to the second mortgagee (*a*).

A mortgage was held by an assignee for the benefit of the mortgagee who assigned it, and the mortgagor, without notice of such assignment, paid the mortgagee and obtained from him a discharge under the statute. The court held the payment good, and ordered the assignee to execute a release, it being doubtful whether under the circumstances the discharge from the mortgagee would revest the property in the mortgagor (*b*).

An assignment of a mortgage for \$1150 recited that the assignee had lent \$1000 to the assignor for one year, on the promissory note of the assignor, and that the assignor had agreed to execute the assignment as collateral security. The assignor assigned the mortgage, the sum of \$1150 and interest, and the benefit of all the powers, covenants and provisos contained in the mortgage, with power to use the assignor's name, etc., and granted the lands mentioned in the mortgage, subject to the terms of the mortgage and subject to a special covenant by which the assignee agreed to reassign the mortgage and the mortgage money and to reconvey the lands on repayment of the sum of \$1000 and interest. It was held that the assignee had the right to receive the whole of the mortgage money and give a discharge which upon registration would revest the mortgaged lands in the mortgagor (*c*).

A mortgage, on her own property, made by a wife to the

(*a*) *Sangster v. Cochrane*, 1884, 28 Ch. D. 298, and cases there cited; see also *Brown v. McLean*, 1889, 18 O.R. 533, and chapter 8, *The Registry Act*, §78.

(*b*) *McDonough v. Dougherty*, 1862, 10 Gr. 42; see also *Engerson v. Smith*, 1862, 9 Gr. 16.

(*c*) *Re Bland and Mohun*, 1913, 30 O.L.R. 100, 16 D.L.R. 716. It is submitted, however, that a reassignment of the mortgage to the original mortgagee and a discharge by him would be more regular. As to the requisites of a valid assignment, see chapter 11, *Assignment of Mortgage*, §102.

plaintiffs, to which the husband was a party, but without conveying or joining in the covenants, was given as collateral security for the payment of certain notes made by the husband and wife to secure the husband's indebtedness. Subsequently another mortgage was given by the wife which became vested in the defendants, the bank. Further liabilities were incurred by the husband to the plaintiffs, and payments were made on account, and subsequently the whole indebtedness was adjusted, the plaintiffs taking in payment the notes of the husband alone, maturing at several future dates, in substitution of the original notes which the plaintiffs agreed to cancel and deliver up. Some time after this the wife executed an agreement recognizing the mortgage to the plaintiffs as existing and as security for a certain sum. It was held that the effect of what took place was to extinguish the liability on the notes secured by the mortgage to the plaintiffs, and the mortgage itself given as collateral security therefore, and that the right to have it discharged enured to the benefit of the holders of the second mortgage, and that such right was not affected by the agreement subsequently entered into between the wife and the plaintiffs (*d*).

§185. *Discharge in case of death of mortgagee.*

Formerly a certificate of discharge executed by the mortgagee, his assignee, or by such other person as might be entitled by law to receive the money and to discharge the mortgage, when registered operated as a reconveyance (*e*). In view of the statutory provision authorizing the survivor or survivors of two or more mortgagees or the personal representative of the survivor, to give a receipt (*f*), it was held

(*d*) *Waterous Engine Works Co. v. Livingstone*, 1904, 7 O.L.R. 740.

(*e*) See §184, *supra*.

(*f*) R.S.O. 1914, c. 112, s. 11. See chapter 13, *Persons entitled on Death of the Mortgagee*, §124.

that such surviving mortgagee or mortgagees or personal representative might execute a discharge which on registration would operate as a reconveyance (*g*). Under the present wording of s. 67 of the Registry Act (*h*), however, a discharge must be executed by the mortgagee, his executors, administrators or assigns, in order that it may, when registered, operate as a reconveyance, and it appears therefore that in the event of the death of one or some of two or more mortgagees, a discharge must be executed by the personal representatives of the deceased mortgagee or mortgagees as well as by the surviving mortgagee or mortgagees in order to operate under the statute.

It was formerly provided by the Act respecting Mortgages of Real Estate, R.S.O. 1897, c. 136, s. 12, as follows:

12. Every certificate of payment or discharge of a mortgage, or of the conditions therein, or of the lands or of any part of the same, or of any part of the money, by the mortgagee, or his assignee, his heirs, executors, administrators, or assigns, or any of them, at whatsoever time given, and whether before or after the time limited by the mortgage for payment or performance, shall, if in conformity with the Registry Act, be valid, to all intents and purposes whatsoever (*i*).

Under this section it was held that a discharge executed by two of three executors was valid to release a mortgage made to their testator (*j*). The decision probably rests on the ground that one of several executors can receive and discharge debts due to their testator.

Where a mortgagor who was one of the mortgagee's executors executed a discharge of the mortgage made by himself

(*g*) *Dilke v. Douglas*, 1880, 5 O.A.R. 63, at pp. 70-72.

(*h*) See §184, *supra*.

(*i*) This section has been omitted from the Mortgages Act, R.S.O. 1914, c. 112, and is represented in the present revised statutes only by the words "at any time given, and whether before or after the time limited by the mortgage for payment or performance, if in conformity with this Act" in s. 67 of the Registry Act (*supra*, §184).

(*j*) *Ex parte Johnson*, 1875, 6 O.P.R. 225.

its validity was questioned (*k*), and where one executor gave a mortgage to his co-executor to secure a debt due by him to the estate and after the death of his co-executor executed a discharge of his own mortgage it was held to be ineffectual (*l*).

Formerly on the death of the mortgagee his executor or administrator became entitled to the mortgage money as part of the personal estate, but if the mortgagee died intestate the legal estate descended to the heir, who held it as trustee for the administrator. The inconvenience arising from the separation of the legal estate and the right to the mortgage debt has, however, been remedied by statute (*m*).

An executor derives his title not from the letters probate which are merely evidence—but from the will itself, whereas an administrator derives his title purely from the grant of administration. The executor of a mortgagee, who has proved the will in Scotland and registered the will and the foreign probate in the county in Ontario in which the mortgaged land is situate, may execute a valid discharge of the mortgage without proving the will in Ontario or having the probate resealed by a surrogate court in Ontario (*n*). On the other hand, a foreign administrator cannot validly release or discharge a mortgage of land in Ontario, and payment to him and a release by the beneficiaries are not sufficient to entitle the owner to a certificate of title free from encumbrance under the Quietening Titles Act (*o*).

(*k*) *McPhadden v. Bacon*, 1867, 13 Gr. 591.

(*l*) *Beaty v. Shaw*, 1886, 13 O.R. 21, 14 O.A.R. 600.

(*m*) See chapter 13, *Persons entitled on Death of the Mortgagee*, §§121, 122. As to the present mode of devolution of land held by way of mortgage, see §123.

(*n*) *Re Green and Platt*, 1913, 29 O.L.R. 103, 13 D.L.R. 547.

(*o*) *In re Thorpe*, 1868, 15 Gr. 76.

§186. *Vesting order.*

It is provided in Ontario by the Trustee Act, R.S.O. 1914, c. 121, s. 9, as follows (p) :

D. Where a mortgagee of land has died without having entered into the possession or into the receipt of the rents and profits thereof, and the money due in respect of the mortgage has been paid to a person entitled to receive the same, or that last mentioned person consents to an order for the reconveyance of the land the Supreme Court may make an order vesting the land in such person or persons, in such manner, and for such estate as the Court may direct, in any of the following cases: -

(a) Where an heir, or personal representative, or devisee, of the mortgagee is out of Ontario or cannot be found; or

(b) Where an heir, or personal representative, or devisee of the mortgagee, on demand made by or on behalf of a person entitled to require a conveyance of the land, has stated in writing that he will not convey the same, or does not convey the same for the space of fourteen days next after a proper deed for conveying the land has been tendered to him by or on behalf of the person so entitled; or

(c) Where it is uncertain which of several devisees of the mortgagee was the survivor; or

(d) Where it is uncertain, as to the survivor of several devisees of the mortgagee, or as to the heir or personal representative of the mortgagee, whether he is living or dead; or

(e) Where there is no heir or personal representative of a mortgagee who has died intestate as to the land, or where the mortgagee has died and it is uncertain who is his heir or personal representative or devisee.

Provision is made by the Lunacy Act, R.S.O. 1914, c. 68, s. 26 (q), for a vesting order where a lunatic is solely or jointly seized or possessed of any land upon trust or by way of mortgage, and for an order releasing and disposing of the land where a lunatic is solely or jointly entitled to a contingent right in any land upon trust or by way of mortgage.

It is also provided by the Trustee Act, R.S.O. 1914, c. 121, s. 8 (r), as follows:

8. Where any person entitled to or possessed of land, or entitled to any contingent right in land, by way of security for money, is an

(p) Following the English statute 56 & 57 V. c. 53, s. 29.

(q) Following the English statute 53 & 54 V. c. 5, ss. 134, 135

(r) Following the English statute 56 & 57 V. c. 53, s. 28.

infant, the Supreme Court may make an order vesting or releasing or disposing of the land or right in like manner as in the case of an infant trustee.

It is provided by the Conveyancing and Law of Property Act, R.S.O. 1914, c. 109, s. 22 as follows (s) :

21. - (1) Where land subject to an incumbrance, whether immediately payable or not, is sold by any Court or out of Court, the Supreme Court or the Court in which the sale takes place may, on the application of any party to the sale, direct or allow payment into Court, in the case of an annual sum charged on the land, or of a capital sum charged on a determinable interest in the land, of such amount as, when invested in securities approved by the Court, the Court considers will be sufficient by means of the income thereof to keep down or otherwise provide for that charge; and in any other case of capital money charged on the land, of an amount sufficient to meet the incumbrance and any interest due thereon: but in either case there shall also be paid into Court such additional amount as the Court considers will be sufficient to meet the contingency of further costs, expenses, and interest, and any other contingency except depreciation of investments, not exceeding one-tenth of the original amount to be paid in, unless the Court for special reasons thinks fit to require a larger additional amount.

(2) The Court may thereupon, either after or without notice to the incumbrancer, declare the land to be freed from the incumbrance, may make any order for conveyance, or vesting order, proper for giving effect to the sale, and may give directions for the retention and investment of the money in Court.

(3) After notice served on the persons interested in or entitled to the money or fund in Court, the Court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof.

(4) Payment of money into Court shall effectually exonerate therefrom the person making the payment.

(5) The application shall be made in chambers, and on notice.

(6) On an application by a purchaser notice shall be served in the first instance on the vendor.

(7) On an application by a vendor, notice shall be served in the first instance on the purchaser.

(8) On any application notice shall be served on such persons as the Court thinks fit.

(s) Following the English statute 44 & 45 V. c. 41, s. 5.

(9) The Court may make such order as it deems just respecting the costs, charges or expenses of any of the parties to the application.

rior to 1915 no provision was made in Ontario for a vesting order or an order releasing the land in the case of an absent mortgagee, although there was a provision in the Trustee Act authorizing the Court to make a vesting order in the case of an absent trustee (*t*). In English conveyancing practice a deed conveying property in trust for sale and directing payment of a debt out of the proceeds is not uncommon, and such a trust deed is frequently described as a "mortgage." It was held, however, not to be a mortgage within the meaning of the corresponding provision of the English Trustee Act, and therefore a vesting order was made under trustee clauses (*u*), but a mortgage in the ordinary form, containing a power of sale providing that the surplus proceeds of sale after payment of the mortgagee's claim shall be held in trust for the mortgagor, is a mortgage and not a trust deed (*v*), and therefore a vesting order cannot be made in the case of the mere absence of the mortgagee (*w*).

(*t*) R.S.O. 1914, c. 121, s. 6, following the English statute 56 & 57 V. c. 53, s. 26.

(*u*) In re Underwood, 1857, 3 K. & J. 715.

(*v*) In the Ontario Trustee Act, as in the corresponding English statute, it is provided that "trust" shall not mean the duties incident to an estate conveyed by way of mortgage. During the continuance of a mortgage there is no relation of trustee and *cestui que trust* between mortgagor and mortgagee. London and County Banking Co. v. Goddard, [1897] 1 Ch. 642, at p. 659.

(*w*) Re Worthington and Armand, 1915, 33 O.L.R. 191, 21 D.L.R. 402, not following In re Keeler's Mortgag, 1863, 32 L.J. Ch. 101. It was pointed out that in the circumstances of the case an application might be made under s. 21 of the Conveyancing and Law of Property Act quoted above.

In 1915 the Mortgages Act, R.S.O. 1914, c. 112, s. 11 (x), was amended by the addition of the following sub-sections (y) :

(2) Where it is impossible for a mortgagor or other person entitled to pay off a mortgage and to receive a certificate of discharge thereof to pay the principal or interest accruing due at any time on such mortgage and to obtain a proper discharge thereof, owing to the whereabouts of the mortgagee, or of one or more of several mortgagees or other person or persons entitled to receive such payment and to give such discharge, being unknown or for some other cause, the court may on the application of the mortgagor, or in the case of a mortgage to more persons than one as mortgagees, on the application of one of the mortgagors, direct payment into court of such principal or interest, and by the same or a subsequent order may direct payment out to any mortgagee of the portion thereof to which he is entitled.

(3) Payment of such money into court shall effectually exonerate therefrom the person making such payment, and when the total amount of the principal and interest due on such mortgage shall have been paid into court by the mortgagor he shall be entitled to an order discharging such mortgage, and the registration of a certificate of such order in the proper registry office shall have the same force and effect as the registration of a certificate of discharge of the mortgage as provided by *The Registry Act*.

(4) The application shall be made in chambers on originating notice in accordance with the practice of the Supreme Court.

(5) The Judges of the Supreme Court may make rules in the manner provided by *The Ontario Judicature Act* with respect to rules of court for regulating the practice upon the application under subsections 2 to 4, for prescribing the proofs required to be furnished by the applicant as to the state of accounts, and for providing for the terms and conditions upon which an order may be made under sub-section 2.

(6) The conditions may include the payment into court of an amount greater than the amount shown to be due on the mortgage or may require security to be given by the mortgagor or other person applying, as the judge may deem proper.

(x) This section is quoted in chapter 13, *Persons entitled on Death of the Mortgagor*, §124. It validates payment of the mortgage money to, and receipt by, the survivor or survivors of two or more mortgagees or the personal representatives of the survivor.

(y) 5 G. 5, c. 21, s. 1.

§187. Discharge under the Land Titles Acts.

A mortgage under the land titles system does not convey the legal estate or transfer the land to the mortgagee, but has effect as security merely (s. 120). Therefore the mortgagee has no estate to be reconveyed on payment of the mortgage, and a discharge does not operate as a reconveyance of the mortgagee's estate to the mortgagor or other person best entitled, as under the system of registration of deeds (a). The state of the title is that it appears from time to time on the register and the effect of registration of a discharge is simply to get rid of the mortgage in whole or in part as a charge upon the estate of the mortgagor.

It is provided by the Real Property Act, R.S.M. 1913, c. 104, s. 112, that

112. Upon the production of any memorandum of discharge of mortgage or encumbrance, duly executed, discharging the whole or part of such mortgage or encumbrance on the whole or part of the land comprised therein, the registrar shall make an entry in the register, noting in such entry the mortgage or encumbrance is discharged wholly or partly, and the land is discharged as aforesaid, as the case may be, and upon such entry being made, such mortgage or encumbrance shall be deemed to be released to the extent named in such memorandum.

It is provided in the Land Titles Act, 1917, s. 118, as follows:

118 -- (1) Upon the production to the registrar of:

(a) A memorandum of discharge, duly executed, and attested, discharging the whole or part of a mortgage or encumbrance, or the whole or a part of the land therein comprised; or

(2) See chapter 10, *The Land Titles Acts*, §93.

(a) See §§181, 182 and 184.

(b) Under ss. 74 and 90 a similar entry must be made on the duplicate certificate of title unless production thereof is dispensed with under the provisions of the statute, and under s. 127 the certificate of charge, if any, must be delivered up or its loss or destruction proved.

12 CHAPTER XIX. DISCHARGE OR RECONVEYANCE

- (b) a certificate signed by a judge that payment of the whole or a part of the moneys due under a mortgage or encumbrance has been proved to his satisfaction;

the registrar shall make an entry on the register that the mortgage or encumbrance is discharged wholly or in part, or that part of the land is discharged, as the case may be.

(2) Upon such entry being made the land, or the estate or interest in the land, or the portion of the land mentioned or referred to therein shall cease to be liable for such principal sum or annuity or for the part thereof mentioned in the entry as discharged, as the case may be.

Provisions similar in effect to those of the Saskatchewan statute are contained in the Land Titles Acts of Alberta (*d*) and the Northwest Territories (*e*), except that the last mentioned statutes provide for the production of the mortgage or encumbrance having endorsed thereon or attached thereto a receipt or acknowledgment in the prescribed form, and the Alberta statute also provides that "where it is stated in the mortgage or encumbrance that the money has been advanced on joint account" the receipt or acknowledgment may be signed by "the surviving mortgagee or encumbrancee."

It is provided in Manitoba (*f*) that if a mortgagor becomes entitled to pay off a mortgage, and the mortgagee is absent from the province and there is no person in the province authorized to receive the money and execute a discharge, after the date appointed for the redemption of the mortgage, payment may be made to the provincial treasurer.

(c) 1917 (2nd sess.), c. 18, s. 118. Provision is made by s. 119 for the discharge of an encumbrance, and by ss. 50 and 54 for the making of an entry on the duplicate certificate of title.

(d) 1906, c. 24, s. 63, as amended by 1911-12, c. 4, s. 15. Provision is also made by s. 71, as amended by 1911-12, c. 4, s. 15, for the production of the certificate of charge, if any, or proof of its loss or destruction, and by ss. 20 and 25 for the making of an entry on the duplicate certificate of title.

(e) R.S.C. 1906, c. 110, s. 100. Provision is made by s. 41 for the making of an entry on the duplicate certificate of title.

(f) R.S.M. 1913, c. 171, s. 125.

In Saskatchewan, Alberta and the Northwest Territories (g) it is provided that if a mortgagor becomes entitled to pay off the mortgage money and the registered mortgagee is absent and there is no person authorized by registered power of attorney to give a receipt, after the date appointed for redemption, a judge may direct payment, in the case of Saskatchewan, to the provincial treasurer, and in the case of Alberta and the Northwest Territories, to a chartered bank. The Saskatchewan statute also has a similar provision if the registered mortgagee is deceased and has no personal representative.

In Ontario it is provided by the Land Titles Act, R.S.O. 1914, c. 126, s. 37, as follows:

37. (1) The proper master of titles shall, on the requisition of the registered owner of any land and on due proof of the satisfaction of a charge thereon, or may, on the requisition of the registered owner of a charge or of his personal representative or on his certificate of the satisfaction thereof, note on the register in the prescribed manner, by cancelling the original entry or otherwise, the cessation of the charge, and thereupon the charge shall cease.

(2) The master may in like manner and with the like effect note the cessation of any other encumbrance.

(3) On the requisition or certificate of the registered owner of a charge or of the personal representative of such owner authorizing or certifying the discharge of any part of the land therefrom or the discharge of any part of the money thereby secured, the master may note on the register the discharge of such land from the charge or the discharge of such part of the money and thereupon as to the land or money discharged the charge shall cease.

(4) The death of the person who signed the requisition or certificate shall not revoke or otherwise affect the same.

(g) Sask. statutes, 1917 (2nd sess.), c. 18, s. 120; Alta. statutes, 1906, c. 24, s. 65; R.S.C. 1906, c. 110, s. 102.

CHAPTER XX.

RIGHT TO ASSIGNMENT OF MORTGAGE.

- §191. Reconveyance to the person best entitled, p. 324.
- §192. Statutory right to assignment of mortgage instead of reconveyance, p. 326.
- §193. The amending statute, p. 329.
- §194. Priorities unaffected by the statute, p. 330.
- §195. Assignment on the same terms as reconveyance, p. 335.
- §196. Statute not applicable to mortgage in possession, p. 336.

- §191. *Reconveyance to the person best entitled.*

The effect of a legal mortgage is to transfer the legal estate in the land to the mortgagee and to create in favour of the mortgagor a right to redeem the mortgage. The effect of a second mortgage is to transfer to the second mortgagee the right to redeem the first mortgage and to create in favour of the mortgagor a new right, namely, to redeem the second mortgage (*a*). In other words, the mortgagor, by making the second mortgage has interposed the second mortgagee between himself and the first mortgagee, so that the three persons may be thought of as standing in a row—the first mortgagee having the legal estate, the second mortgagee next entitled, and lastly the mortgagor. In the event of a further mortgage being made, a similar result follows. Each new mortgage has the effect of interposing a new mortgagee in the row of persons immediately prior to the mortgagor, and the persons interested will be entitled in succession—the first mortgagee, the second mortgagee, the third mortgagee, etc., the mortgagor (*b*). Each mortgage after the legal mortgage will ne-

(*a*) Cf. chapter 14, *Transferee of the Equity of Redemption*.
§131.

(*b*) Cf. Langdell, *Brief Survey of Equitable Jurisdiction*, p. 9.

cessarily be merely an equitable mortgage (c), but each of the persons interested will be potentially entitled to the legal estate in succession, in the event of prior claims ceasing to exist. The mortgagor may of course at any time convey the land absolutely subject to the mortgage or mortgages existing at the time of conveyance and the grantee will take the mortgagor's place in the succession of persons interested (d).

No person who redeems a mortgage is entitled to call for an assignment of the mortgage otherwise than by virtue of a contract to that effect or by virtue of the statute mentioned below (e). Apart from statute or a special agreement a mortgagee on being redeemed is obliged merely to reconvey the mortgaged estate (f). The mortgagee is bound to reconvey to the person best entitled to the estate (g), that is, to the owner of the equity of redemption, if there is no subsequent encumbrancer, otherwise to the first subsequent encumbrancer (h), but he is not obliged to convey to any other person who by virtue of the conveyance would acquire the position of mortgagee in priority to persons better entitled to the legal estate (i). If the mortgagee, instead of reconveying, executes a discharge in the statutory form, this discharge upon registration will in the case of a registered mortgage operate as a reconveyance of the estate to the person best entitled (j).

(c) See chapter 5, *Equitable Mortgages*, §43.

(d) See chapter 14, §132.

(e) See §192, *infra*.

(f) *Gooderham v. Traders Bank*, 1888, 16 O.R. 438, at p. 441.

(g) Cf. chapter 19, *Discharge or Reconveyance*, §182.

(h) *Smith v. Green*, 1844, 1 Coll. 555, at p. 563.

(i) *James v. Biou*, 1819, 3 Swan. 234, at p. 241; *Dunstan v. Paterson*, 1847, 2 Ph. 341, at p. 345; *Colyer v. Colyer*, *Pawley v. Colyer*, 1863, DeG. J. & Sm. 676, at p. 693; cf. 21 Halsbury, *Laws of England*, p. 170; *Fisher, Law of Mortgages*, 6th ed., p. 989.

(j) See chapter 19 §181.

§192. *Statutory right to assignment of mortgage instead of reconveyance.*

It is now provided in Ontario by the Mortgages Act, R.S.O. 1914, c. 112, s. 3, as follows (*k*).

3.—(1) Notwithstanding any stipulation to the contrary where a mortgagor is entitled to redeem he may require the mortgagee, instead of giving a certificate of payment or reconveying, and on the terms on which he would be bound to re-convey, to assign the mortgage debt and convey the mortgaged property to any third person as the mortgagor directs; and the mortgagee shall be bound to assign and convey accordingly.

(2) The right of the mortgagor to require an assignment shall belong to and be capable of being enforced by each incumbrancer or by the mortgagor, notwithstanding any intermediate incumbrance, but a requisition of an incumbrancer shall prevail over that of the mortgagor, and as between incumbrancers a requisition of a prior incumbrancer shall prevail over that of a subsequent incumbrancer.

(3) This section shall not apply if the mortgagee is or has been in possession.

Sub-ss 1 and 3 are derived from the English statute of 1881, 44 & 45 V. c. 41, s. 15, and sub-s. 2 from the amending statute of 1882, 45 & 46 V. c. 39, s. 12. The words "giving a certificate of payment or" are not in the English statute. As already pointed out, a certificate of discharge when registered operates in Ontario as a reconveyance (*l*). Sub-ss. 2 and 3 will be discussed later (*m*).

The leading case in England as to the original statute of 1881 is *Teevan v. Smith* (*n*) in which Jessel, M.R., says (*o*):

"We must remember what the law was before that Act was passed. A mortgagor had only a right to redeem and to have a recon

(*k*) By s. 2 (*d*) it is provided that "mortgagor" shall include any person deriving title under the original mortgagor or entitled to redeem a mortgage, according to his estate, interest or right in the mortgaged property, and "mortgagee" shall include any person deriving title under the original mortgagee.

(*l*) See chapter 19, *Discharge or Reconveyance*, §184.

(*m*) As to sub-s. 2, see §193; as to sub-s. 3, see §196.

(*n*) 1882, 20 Ch.D. 724.

(*o*) 20 Ch.D. 724 at pp. 728-9.

ment on payment of the mortgage debt. Hence a difficulty arose, for lenders were willing to advance money if they could have a title to the mortgage security, but were not willing to take security directly from the mortgagor, dreading intermediate incumbrances. At that time the debt was not transferable, so that a power of attorney was necessary; therefore the old decisions were right in saying down that a mortgagee was not to be required to run the risk of being made liable to costs, which he might be, if he transferred the debt to a third person. Now the difficulty has been got rid of by making the debt transferable at law, so that no power of attorney is required and all ground of objection on the part of a mortgagee to transfer the security is taken away. It can do him no harm in any way."

The words "where a mortgagee is entitled to redeem" are explained by Jessel, M.R., as follows (*p*):

"[The section] says, 'where a mortgagor is entitled to redeem.' Every mortgagor is entitled to redeem, but there is a difference in their rights. Where there is one mortgagor and one mortgagee, there, of course, his right to redeem is absolute. But where there are several successive mortgagees the mortgagor can redeem the next to him without redeeming any other; but if he wishes to redeem any anterior mortgage, he must also redeem all those who are between that mortgagee and himself. A puisne mortgagee indeed is in rather a worse position than this; for, although he is entitled to redeem those above him, he cannot do so without foreclosing those between himself and the ultimate equity of redemption (*q*). So that the words 'where a mortgagor is entitled to redeem' really includes every mortgagor, except a mortgagor who is precluded by some special term in his mortgage deed from redeeming within a specific time. For although the law will not allow a mortgagor to be precluded from redeeming altogether, yet he may be precluded from redeeming for a fixed period, such as five or seven years (*r*). That is why the words 'where a mortgagor is entitled to redeem' are inserted. They mean where a mortgagor is not precluded from redeeming for a certain time by some special stipulation."

A mortgagor who has conveyed away the equity of redemption acquires a new right to redeem if he is sued on the covenant for payment and becomes again a mortgagor "entitled

(*p*) *Teevan v. Smith*, 1882, 20 Ch. D. 724, at p. 729.

(*q*) See chapter 25, *Action for Redemption*, §257.

(*r*) See chapter 25, §252.

to redeem" within the meaning of the statute if there are no subsequent encumbrances.

The key to the meaning of the statute lies in the words "instead of reconveying." Jessel, M.R., says *et seq.*:

"Then [the section] says, 'he shall have power to require the mortgagee, instead of reconveying, and on the terms on which he would be bound to reconvey, to assign the mortgage debt and convey the mortgaged property to any third person.' It is only 'instead of reconveying.' The section assumes two things: first, that the mortgagee is bound to reconvey to the person applying to him, and, secondly, that the transfer is to be instead of a reconveyance. Then see how it works. Where there are first and second mortgages, and the first mortgagee has notice of the second, when he is paid off he becomes a trustee of the legal estate for him. The word 'reconvey' is the proper word to use; it is strictly a reconveyance. If the first mortgagee is paid off by the mortgagor, he is not bound to reconvey the estate to him; but if he is paid off by the second mortgagee, he is bound to reconvey it to him. The second mortgagee is a mortgagor under the definition of the Act. He is an assign of the mortgage and is entitled to redeem. It appears to me that no person can avail himself of [subs. 1] who is not entitled to call for a reconveyance of the estate from the mortgagee. The Act never intended to effect any change in the person who was entitled to call for a reconveyance.

"There is another point, which does not arise in the view which I take of the section, but which I may mention. Every person who is behind the first mortgagee is entitled to redeem, and is a mortgagor within the meaning of the section, and if there are several successive mortgages of the same mortgagor, which of them has a right in priority to the others to call upon the first mortgagee to assign the mortgage? It must be that one who is next to him. The first incumbrancer has the first right to redeem, and it is impossible to suppose that it was intended that a puisne mortgagee was to have the right to call for a transfer of the first mortgage, before one who is prior to himself.

"It is alleged that there was a tender in this case by the mortgagor, but a tender is not payment; and according to my view of the case, it would have been immaterial, even if there had been actual payment by the mortgagor. If before the reconveyance is made the second mortgagee calls on the first to reconvey he must have the prior right. He is the mortgagor of the estate as between himself

1) *Queen's College v. Claxton*, 1894, 25 O.R. 282, at p. 289.

2) *Troxell v. Scott*, 1882, 20 C.L.O. 124, at pp. 129, 130.

and all behind him, and he has the prior right to require a reconveyance or a transfer."

§193. *The amending statute*

After the decision in *Teevan v. Smith* (a) the English statute of 1881 (c) was amended by the addition of the provision which is now contained in R.S.O. 1914, c. 112, s. 3, sub-s. 2, as follows:

(2) The right of the mortgagor to require an assignment shall belong to and be capable of being enforced by each incumbrancer or by the mortgagor, notwithstanding any intermediate incumbrance; but a requisition of an incumbrancer shall prevail over that of the mortgagor, and as between incumbrancers a requisition of a prior incumbrancer shall prevail over that of a subsequent incumbrancer.

It has been said that the amendment overruled the construction placed upon sub-s. 1 in *Teevan v. Smith*, namely that the mortgagee could be required to transfer the mortgage only at the direction of the person who was entitled to a reconveyance, that is, the first subsequent incumbrancer (w). This statement is, however, susceptible of being misunderstood, unless it is qualified by reference to the opinions expressed that the effect of the amendment is to confirm the decision in *Teevan v. Smith* so far as it was there held that the word "mortgagor" in the principal act means the person who has, in priority to all other persons interested, the right to call upon the first mortgagee to transfer the mortgage, and to leave unaffected that decision so far as it lays down the rule that the consent of a mesne incumbrancer is still necessary to enable a subsequent incumbrancer or the mortgagor as the case may be, to require a transfer instead of a recon

(a) 1882, 20 Ch.D. 724. See §192, *supra*.

(c) I.e., sub-ss. 1 and 3 of R.S.O. 1914, c. 112, s. 3. See §192, *supra*.

(w) 21 Halsbury, Laws of England, p. 170, note (d).

veyance (*x*). It is said also that the amending act throws upon the mortgagee the burden, to which he was not previously subject, of determining which among several encumbrancers who may require an assignment is entitled to priority (*y*) and that the mortgagee cannot safely transfer the mortgage to the mortgagor or his nominee without the consent of puisne encumbrancers of whose charges he has notice (*z*).

Where the plaintiffs in a foreclosure action held first, second and fourth encumbrances and a jointress was entitled as third encumbrancer, a special decree was made providing *inter alia*, that in the event of the jointress redeeming the plaintiffs, the plaintiffs as fourth encumbrancers should have a further period within which to redeem and that upon their paying to the jointress all that should be found due upon the taking of the account she should convey and assign to them subject to the jointure, liberty being reserved to apply subsequently to have the conveyance and assignment made to trustees (*a*).

§194. *Priorities unaffected by the statute.*

When a mortgage is paid off the statute under discussion provides in effect that the person who in priority to all other persons interested would be entitled to require a reconveyance of the estate from the mortgagee, may require the mortgagee to transfer the mortgage instead of reconveying the estate, but it does not make any change in the priorities inter

(*x*) Coote, *Law of Mortgages*, 8th ed., vol. 2, p. 1441, citing *Kinnaird v. Trollope*, 1888, 39 Ch. D. 636, and *West London Commercial Bank v. Reliance Permanent Building Society*, 1885, 29 Ch. D. 954. To the same effect, see Fisher, *Law of Mortgages*, 6th ed., p. 989; *Leitch v. Leitch*, 1901, 2 O.L.R. 233, at pp. 236, 237.

(*y*) *Leitch v. Leitch*, *supra*, citing Fisher on Mortgages.

(*z*) Fisher v. Mortgages, *loc. cit.*, approved in *In re Magneta Time Co., Molden v. The Company*, [1915] W.N. 318, 84 L.J. Ch. 814.

(*a*) *Smithett v. Hesketh*, 1890, 44 Ch.D. 161.

se of the persons interested (*b*). The cases decided since the passing of the statute may therefore be used to illustrate the questions of priority which may arise as between the mortgagor and the second mortgagee and as between the mortgagor and the assignee of the equity of redemption.

As between the mortgagor who has paid off the first mortgage and the person to whom he has made a second mortgage the latter is entitled to priority, and the first mortgagee, on being paid off, must not assign his mortgage to the mortgagor or his nominee without the consent of the second mortgagee (*c*). Similarly, if the first mortgagee is himself the second mortgagee, under a mortgage from the same mortgagor, he is entitled for his own protection to refuse to give the mortgagor an assignment of the first mortgage, just as he would be entitled to refuse to reconvey, except subject to the second mortgage (*d*).

But the case is different if the first mortgagee holds a second mortgage made not by the original mortgagor but by a purchaser of the equity of redemption, as, for instance, if a mortgage is made by B to A, a conveyance of the land by B to C subject to the mortgage, and then a second mortgage by C to A. The original mortgagor is under no responsibility for the second mortgage, and if he pays off the first mortgage there is no equity in the mortgagee's favour as against the mortgagor which would entitle the mortgagee to refuse to give the mortgagor an assignment of the first mortgage (*e*).

The question whether the original mortgagor is entitled to keep the mortgage alive as a first charge on the land as

(*b*) See §§192 and 193, *supra*.

(*c*) Teevan v. Smith, 1882, 20 Ch.D. 724.

(*d*) Rogers v. Wilson, 1887, 12 O.P.R. 322, 545.

(*e*) Kinnaid v. Trollope, 1888, 39 Ch.D. 636; Wheeler v. Brooke, 1894, 26 O.R. 96.

against the purchaser of the equity of redemption will be next discussed.

As between the mortgagor who pays off a mortgage and the assignee of the equity of redemption, the question whether the mortgagor is entitled to require the mortgagee to assign the mortgage depends upon the terms upon which the equity of redemption has been assigned and is independent of the circumstance that there is or is not a second mortgage.

If the equity of redemption has been assigned in such circumstances that as between the mortgagor and the assignee the latter is liable to pay the mortgage, as, for instance, in the ordinary case of the sale of the equity of redemption where the purchaser assumes payment of the mortgage, the mortgagor on paying the mortgage is entitled to require it to be assigned to him so as to keep it alive as a charge on the land in order that he may recoup himself for the money paid by him which the purchaser ought to have paid (*f*).

A mortgagor of land conveyed his equity of redemption to several grantees, one of whom agreed to pay off the mortgage, and some of whom also executed further mortgages upon the land. The first mortgagee proceeded to foreclose and to sue the mortgagor upon his covenant, whereupon the latter requested the first mortgagee to assign his mortgage to a third person who advanced the money and paid off the mortgage. It was held that the first mortgagee was bound to execute the assignment as asked, notwithstanding the subsequent incumbrances, and that even if the redemption money had been that of the mortgagor himself, it would have made no difference (*g*).

(*f*) *Hamilton Provident Loan and Investment Co. v. Smith*, 1888, 17 O.R. 1; *Queen's College v. Claxton*, 1894, 25 O.R. 282; *Wheeler v. Brooke*, 1894, 26 O.R. 96.

(*g*) *Queen's College v. Claxton*, 1894, 25 O.R. 282, distinguishing *Teevan v. Smith*, 1882, 20 Ch. D. 724, and following *Kinnaird v. Trollope*, 1888, 39 Ch. D. 630.

If, on the other hand, the equity of redemption has been assigned in such circumstances that as between the mortgagor and the assignee the former is liable to pay the mortgage, the mortgagor on paying the mortgage is not entitled to require it to be assigned to him, because the keeping of the charge alive would be inconsistent with his obligation to give the land to the assignee free from encumbrance (*h*).

A purchaser of the equity of redemption may redeem the mortgage as fully as the mortgagor himself might have done, and on the same terms, but the purchaser of an equity of redemption subject to a charge which is his own proper debt, or which he is under contract, express or implied, to discharge, cannot keep such charge alive against a mesne incumbrance, which by the terms of contract of purchase, express or implied, the purchaser was also bound to discharge (*i*).

Mortgagors of land sold it subject to the mortgage, the purchaser giving them a second mortgage to secure part of the purchase money. The purchaser then sold the land subject to both mortgages, which his sub-purchaser covenanted to pay off. Subsequently the first mortgagors, under a threat of action, paid the claim of the first mortgagees, and took an assignment of the first mortgage to one of themselves. It was held that the sub-purchaser, upon being called on by the first mortgagors and first purchaser for indemnity against the first mortgage, was bound to pay it, and was not entitled to an assignment thereof without also paying the second mortgage (*j*).

The owner of property mortgaged it and then sold subject to the mortgage, taking from the purchaser as part of his pur-

(*h*) *Muttlebury v. Taylor*, 1892, 22 O.R. 312; *Thompson v. Warwick*, 1894, 21 O.A.R. 637.

(*i*) *L. v. Beaty*, 1855, 5 Gr. 359; *Thompson v. Warwick*, 1894, 21 O.A.R. 637; *Muttlebury v. Taylor*, 1892, 22 O.R. 312.

(*j*) *Thompson v. Warwick*, *supra*.

chase money a second mortgage, which he assigned to the first mortgagee. The purchaser then sold to a sub-purchaser, who, to obtain an extension of time on the first mortgage, entered into a covenant with the mortgagee to pay it, and afterwards sold the property. In a foreclosure action the mortgagee claimed an order for the payment of the first mortgage by the sub-purchaser under his covenant, and the latter refused to pay the amount due on it unless the mortgagee would assign the mortgage to him; but it was held that the mortgagee was not bound to assign unless the sub-purchaser paid off both mortgages (*k*).

Where two mortgages had been created on a leasehold interest in rectory lands, the equity of redemption in which was afterwards sold at a sheriff's sale, and the purchaser paid off the prior mortgage, it was held that the purchaser being bound to protect the mortgagor against both incumbrances, was not at liberty to keep alive the prior mortgage as against the second mortgagee (*l*).

A mortgagee who purchases the equity of redemption is entitled to keep his mortgage alive as against an intervening execution creditor of the mortgagor, in the absence of any act manifesting a contrary intention, but where after purchasing the equity of redemption he releases his mortgage, that is strong evidence that there was no intention to preserve his mortgage (*m*).

Where a person interested in the equity of redemption, but not personally liable for the mortgage debt, pays off a mortgage the question whether it is or is not extinguished is one of intention (*n*).

(*k*) *Muttlebury v. Taylor, supra*.

(*l*) *McDonald v. Reynolds*, 1868, 14 Gr. 691.

(*m*) *Buckley v. Wilson*, 1861, 8 Gr. 566.

(*n*) See chapter 21, *Mortgage*, §201.

§195. *Assignment on the same terms as reconveyance.*

The statute (o) provides that the mortgagee may be required to assign the mortgage "on the terms on which he would be bound to reconvey." This phrase refers not merely to the amount of the principal, interest and costs, but also to the terms generally. The mortgagor cannot by an assignment get a higher or better title to the estate than that to which he would be entitled under a reconveyance. The assignment must be subject to the rights of other persons interested in the equity of redemption. Thus, where lands are mortgaged and then settled on the mortgagor as tenant for life with remainders over, the mortgagor, on redeeming, is entitled to call for an assignment to a third person only upon the terms that the assignment shall be subject to the rights of those interested under the settlement (p).

If there are persons interested in the equity of redemption other than the person redeeming, the reconveyance of the estate or the assignment of the mortgage should be made subject to the rights of all parties interested (q).

If a person who has only a partial interest in the equity of redemption redeems a mortgage, the reconveyance or the assignment to him should be qualified accordingly. The owner of land mortgaged it and then, reserving a life estate to himself, conveyed it in fee subject to the mortgage. The grantee paid off the mortgage and required an assignment of it. It was held that he was not entitled to an absolute assignment of the mortgage because as between him and his grantor he was bound to discharge the grantor's life estate from the mortgage, but that he was entitled to have the mortgage as

(o) See §192, *supra*.

(p) *Alderson v. Elgey*, 1884, 26 Ch.D. 567.

(q) *Kinnaird v. Trellope*, 1888, 39 Ch.D. 636; *Gooderham v. Traders Bank*, 1888, 16 O.R. 438; *Stark v. Reid*, 1895, 26 O.R. 257.

signed to him in such a way that it would remain an encumbrance on the remainder in fee vested in him (r).

§196. Statute not applicable to mortgage in possession

The statute (s) provides that it shall not apply if the mortgagee is or has been in possession. The reason why a mortgagee in possession cannot be required to give an assignment of the mortgage instead of reconveying is that he remains liable to account as mortgagee in possession notwithstanding the transfer (t); and although a transfer at the request of the mortgagor or an encumbrancer might release him from this liability as regards the mortgagor or such encumbrancer, he would not be released as regards other persons interested in the equity of redemption. Hence after a mortgagee has been in possession he cannot with safety transfer his security except under the direction of the court (u). A mortgagee in possession may, however, be required to give a reconveyance (v).

Mortgagees in possession of the mortgaged lands afterwards acquired by transfer a second mortgage on the same lands, and then brought action on the covenant for payment in the first mortgage against the original mortgagors, who had parted with the equity of redemption before the second mortgage was given. It was held that although the defendants were not entitled to an assignment of the mortgage, because the mortgagees were in possession, they were entitled, on paying the first mortgage, to a reconveyance for the purpose of enabling them to maintain a charge upon the estate for the money paid

(r) *Leitch v. Leitch*, 1901, 2 O.L.R. 233, followed in *Jones v. Shortreed*, 1907, 14 O.L.R. 142.

(s) See §192, *supra*.

(t) See chapter 28, *Mortgagee in Possession*, §304.

(u) *Hall v. Howard*, 1886, 52 Ch. D. 430, at p. 435; 21 Halsbury, *Laws of England*, p. 170.

(v) *Stark v. Reid*, 1875, 26 O.R. 257.

by them, such reconveyance to be subject to the rights of redemption of all other persons interested in the equity of redemption (*u*).

(*v*) *Stark v. Reid*, *supra*, following *Kinnaird v. Trollope*, 1888, 39 Ch.D. 636. It was also held in *Stark v. Reid* that the mortgagees were not entitled to tack the amount of the second mortgage to that of the first and require payment of both. See chapter 9, *Consolidation and Tacking*, §87.

CHAPTER XXI.

MERGER.

- §201. Merger at law and in equity, p. 338.
- §202. Intention expressly declared, p. 341.
- §203. Intention gathered from circumstances of transaction, p. 342.
- §204. Intention presumed from consideration of benefit, p. 343.
- §205. Purchase with notice of subsequent charges, p. 346.

§201. *Merger at law and in equity.*

If a mortgage on land and the ownership of the land subject to the mortgage became united in the same person, the mortgage was at law merged in the ownership and the mortgage was extinguished, either by analogy to the merger of a less estate in a greater or because a man cannot be his own debtor. In equity, however, merger did not necessarily follow upon the union of the two interests, and the equitable rule now prevails by reason of the provision of the Judicature Act that in case of conflict or variance between the rules of equity and the rules of law the rules of equity shall prevail (*a*).

It is also specifically provided in Ontario by the Conveyancing and Law of Property Act, R.S.O. 1914, c. 109, s. 36, as follows (*b*):

(*a*) Cf. 21 Halsbury, Laws of England, 318; R.S.O. 1914, c. 56, s. 22 (as to which, see chapter 4, *Law and Equity in Upper Canada*, §3.)

(*b*) The provision in question was formerly contained in the Judicature Act, R.S.O. 1897, c. 51, s. 58 (3), re-enacting 44 V. c. 5, s. 17 (4), which in this respect was copied from the English Judicature Acts. The same equitable rule that merger is a question of intention applies both to the merger of estates and to the merger of charges. Cf. 13 Halsbury, Laws of England, 146; *Capital and Counties Bank v. Rhodes*, [1903] 1 Ch. 621.

36. There shall not be any merger by operation of law only of any estate, the beneficial interest in which, prior to *The Ontario Judicature Act, 1881*, would not have been deemed merged or extinguished in equity.

If the owner of land pays off a charge which he is personally liable to pay, he is not permitted, even by express declaration, to keep the charge alive so as to set it up against subsequent encumbrancers to whom he is liable (c), but, with this exception, merger in equity is a question of intention on the part of the person in whom the two interests unite (d).

In *Forbes v. Moffatt* (e) Grant, M.R., said:

"It is very clear, that a person, becoming entitled to an estate, subject to a charge for his own benefit, may, if he chooses, at once take the estate, and keep up the charge. Upon this subject a Court of Equity is not guided by the rules of law. It will sometimes hold a charge extinguished, where it would subsist at law; and sometimes preserve it, where at law it would be merged. The question is upon the intention, actual or presumed, of the person, in whom the interests are united. In most instances it is, with reference to the party himself, of no sort of use to have a charge on his own estate; and, where that is the case, it will be held to sink, unless something shall have been done by him to keep it on foot."

In *North of Scotland Mortgage Co. v. Udell* (f) Hagarty, C.J., said:

(c) 21 Halsbury, Laws of England, 324, 318; 13 Halsbury, *op. cit.*, 146-148; *Otter v. Lord Vaux*, 1856, 6 DeG. M. & G. 638, at p. 611; *Platt v. Mendel*, 1884, 27 Ch.D. 246, at p. 251; *Blake v. Beaty*, 1855, 5 Gr. 359. For a discussion of the rule stated in the text, for which *Otter v. Lord Vaux* is the chief authority, see *Manks v. Whiteley*, [1912] 1 Ch. 735, at pp. 755, 758, 759; *s.c. reversed*, on other grounds, *sub nom. Whiteley v. Delaney*, [1914] A.C. 132.

(d) *Thorne v. Cann*, [1895] A. C. 11, at pp. 18, 19, 18 R.C. 552, at p. 579; *Donisthorpe v. Porter*, 1762, 2 Eden 162.

(e) 1811, 18 Ves. 384, at p. 390, 17 R.C. 380, at p. 384. In this case the actual intention not being established from the declaration or acts of the party, the intention against merger was inferred from the consideration that it would be for the benefit of the owner of the charge that merger should not take place. See §204.

(f) 1882, 46 U.C.R. 511. See also *North of Scotland Mortgage Co. v. German*, 1880, 31 U.C.C.P. 349; *British and Canadian Loan and Investment Co. v. Williams*, 1888, 15 O.R. 366.

"From all the authorities I gather that in the simple case of the mortgagee taking a conveyance of the equity of redemption, the ordinary presumption is, that the charge, as against the mortgagor, is merged or incapable of being enforced, at least so as to call for evidence to show a contrary intent or result.

Romilly, M.R. in *Tyrwhitt v. Tyrwhitt* (g) said:

"The rule is this: *prima facie* the charge merges in the inheritance, but the presumption may be rebutted if it be shown that the intention of the owner of the charge was that it should not merge. Three tests are usually applied for the purpose of ascertaining whether the owner of the charge intended that it should merge in the inheritance at the time when he became entitled to the absolute interest of the charge. First, any actual expression of that intention; secondly, when the form and character of the acts done are only consistent with the keeping the charge on foot; and thirdly, such an intention may be presumed, when though a total silence in all other respects pervades the matter, it appears that it is for the interest of the owner of the charge that it should not merge in the inheritance."

The presumption in favour of merger does not arise unless the absolute interest in the charge and in the estate subject to the charge unite in the same person during his life. Thus, no presumption arises where the estate in fee of the person entitled to the charge is subject to limitation which only become capable of taking effect by his death, or where the owner of the estate charged has during his life merely a reversionary interest in the charge (h).

If a stranger pays off a mortgage on an estate there is no presumption of merger. Presumably he does not intend to discharge the mortgage but intends to keep it alive for his own benefit (i). "Where a third party, at the request of a

(g) 1863, 32 Beav. 244, at p. 249; cf. *Thorne v. Cann*, [1895] A. C. 11, at pp. 18, 19; 18 R.C. 552, at p. 559.

(h) *Wyndham v. Lord Egremont*, 1775, Amb. 753; *Wilkes v. Collin*, 1869, L.R. 8 Eq. 338. As to the presumption against merger in the case of the payment of a mortgage by the tenant for life, see §204.

(i) *Butler v. Rice*, [1910] 2 Ch. 277, at p. 282; *Chetwynd v. Allen*, [1899] 1 Ch. 356.

mortgagor, pays off a first mortgage, with a view of himself becoming a first mortgagee of the property, he becomes, in default of evidence of intention to the contrary, entitled in equity to stand, as against the property, in the shoes of the first mortgagee" (j).

§202. *Intention expressly declared.*

Where a presumption of merger arises by reason of the union in the same person of a charge and of an estate of inheritance in the property charged, such presumption may be rebutted by a declaration that the charge shall be kept on foot for the benefit of his personal estate (k), or by clear expressions of such intention in the instrument which effects the union of the charge and the estate (l).

Even an express declaration against merger will not keep the charge alive if there are circumstances pointing conclusively to merger (m), but where there is such a declaration it is not necessary, as is sometimes done (n), to take a conveyance either of the charge or of the estate to a trustee so as to prevent a merger at law (o).

If, owing to a common mistake induced by the misconduct of the mortgagor, the deeds as framed do not express the true intention of the parties, they may be rectified under the equitable jurisdiction of the court so as to express such intention. Thus, land was subject to a first mortgage to A and to a second

(j) *Crosbie-Hill v. Sayer*, [1908] 1 Ch. 866, at p. 877; *Fourth City Mutual Benefit Building Society v. Williams*, 1879, 14 Ch.D. 140. Cf. *Whiteley v. Delaney*, [1914] A.C. 132, in §202, *infra*. As to the right of subrogation of a person who pays off a mortgage, see also chapter 8, *The Registry Act*, §78.

(k) *Bailey v. Richardson*, 1852, 9 Hare 734; *Jameson v. Stein*, 1855, 21 Beav. 5.

(l) *Phillips v. Gutteridge*, 1859, 4 DeG. & J. 531; *In re Gibbon*, *Moore v. Gibbon*, [1909] 1 Ch. 367.

(m) *In re Gibbon*, *ubi supra*, at p. 374.

(n) *Bailey v. Richardson*, *ubi supra*, at p. 736.

(o) This follows *a fortiori* from the cases which allow merger

mortgage to M, and F agreed with L (a purchaser of the property), to advance money on the security of a first mortgage, for the purpose of paying off A's mortgage. The mortgagor did not disclose the existence of M's mortgage and consequently the transaction was carried out in a form which would *prima facie* have the effect of extinguishing A's mortgage, namely by (1) a reconveyance by A to the mortgagor, (2) a conveyance by the mortgagor to L, (3) a mortgage by L to F, and delivery of the title deeds to F. In an action by M, who claimed that his mortgage had become the first mortgage, it was held that the plaintiff was not entitled to priority, on the following grounds, namely, (1) that the deeds could have been rectified in the action if the defendants had counterclaimed for that relief and that a court of equity would not in the circumstances enforce in favour of a volunteer (p) a title based upon deeds framed under a common mistake, (2) that F having acquired in equity the priority of A's mortgage by paying the mortgage debt and obtaining the title deeds, the plaintiff could not take advantage of the wrong of the mortgagor, through whom he claimed, to deprive F of that priority (q).

§203. *Intention gathered from circumstances of transaction.*

In the absence of an expressed intention against merger, the presumption of merger arising from the union of a charge

to be rebutted by evidence of intention derived from the circumstances, without express declaration, although there is no intervening trustee. 21 Halsbury, Laws of England, p. 321. As to such cases, see §203, *infra*.

(p) The plaintiff was a volunteer as regards the new priority claimed by him, although he had given value for his mortgage.

(q) *Whiteley v. Delaney*, [1914] A.C. 132, reversing *Manks v. Whiteley*, [1912] 1 Ch. 735. In the view of the case taken by the House of Lords it was unnecessary to express an opinion as to the correctness of the decision in *Toulmin v. Steere*, 1817, 3 Mer. 210

and of an estate of inheritance in the property charged may be rebutted by the circumstances attending the transaction, as for instance where the debt is not released but the mortgage and the mortgagee's rights are transferred to the owner of the estate (*r*).

The presumption in favour of merger may be rebutted by an act on the part of the person in whom the charge and the estate have become united indicating his intention to keep the charge alive (*s*), and correspondence at the time or oral evidence of conduct and dealings relating to the property is admissible to explain the intention (*t*).

A transfer of the mortgage to a trustee is not conclusive evidence against the presumption, and in particular circumstances merger may take place notwithstanding such a transfer (*u*). On the other hand the presumption of merger may be rebutted by evidence of intention derived from the circumstances notwithstanding that there is no transfer of either the charge or the estate to a trustee (*v*).

§204. *Intention presumed from consideration of benefit.*

In the absence of evidence of actual intention, either express or gathered from the circumstances of the transaction

(see §205, *infra*), a decision which was much discussed in the Court of Appeal.

(*r*) *Thorne v. Cann*, [1895] A.C. 11, at p. 19, 18 R.C. 552, at pp. 559-560. There were in this case also other circumstances showing the intention to keep the mortgage alive. Cf. *Reeves v. Konschur*, 1909, 2 S.L.R. 125.

(*s*) *Jones v. Morgan*, 1783, 1 Bro. C. C. 206; *Lord Compton v. Oxenden*, 1793, 4 Bro. C. C. 396; *Tv'ci v. Lake*, 1832, 4 Sim. 53.

(*t*) *Hood v. Phillips*, *infra*; *Astley v. Milles*, 1827, 1 Sim. 298, at p. 341; *Adams v. Angell*, 1877, 5 Ch.D. 634; *Macdonald v. Bullivant*, 1884, 10 O.A.R. 582.

(*u*) *Hood v. Phillips*, 1841, 3 Beav. 513, at p. 518, 18 R.C. 535, at pp. 538, 539.

(*v*) 21 Halsbury, *Laws of England*, 321; *Wat v. Symes*, 1851, 1 DeG. M. & G. 240; *Adams v. Angell*, *supra*.

(*w*), the presumption of merger ordinarily arising from the union of a charge and the estate subject to the charge may be rebutted by the consideration that it is more for the benefit of the owner of the charge and the estate that merger should not take place, as, for instance, if the effect of merger would be to confer priority upon subsequent encumbrancers (*x*).

It is provided in Ontario by the Mortgages Act, R.S.O. 1914, c. 112, s. 9, as follows:

9.—(1) A mortgagee of freehold or leasehold property, may take and receive from the mortgagor a release of the equity of redemption in such property, or may purchase the same under any judgment or decree or execution without thereby merging the mortgage debt as against any subsequent mortgagee or person having a charge on the same property.

(2) Where a prior mortgagee so acquires the equity of redemption of the mortgagor no subsequent mortgagee shall be entitled to foreclose or sell such property without redeeming or selling, subject to the rights of such prior mortgagee, in the same manner as if such prior mortgagee had not acquired the equity of redemption.

(3) This section shall not affect any priority or claim any mortgagee may have under the registry laws (*y*).

When the original of this statute was passed, some legislative enactment was deemed necessary in view of the then general understanding of the effect of *Toulmin v. Steere*, 1817, 3 Mer. 210; but since the passing of the statute the course of judicial decision in England has reduced the danger which that case was supposed to cause to conveyancers (*z*). The statute is to be strictly construed and does not prevent merger where merger is necessary in order to give effect to the intention of the parties (*a*).

(*w*) See §§202, 203, *supra*.

(*x*) *Forbes v. Moffatt*, 1811, 18 Ves. 384, 17 R.C. 380; *Davis v. Barrett*, 1851, 14 Beav. 542; *Elliott v. Jayne*, 1865, 11 Gr. 412; *Weaver v. Vandusen*, 1880, 27 Gr. 477; *MacLennan v. Gray*, 1888, 16 O.R. 321, S. C. 16 O.A.R. 224, 18 Can. S.C.R. 553.

(*y*) See chapter 8, *The Registry Act*.

(*z*) See §205, *infra*.

(*a*) *Armstrong v. Lye*, 1900, 27 O.A.R. 287, and cases cited at pp. 262, 264.

Where a mortgagee purchases the equity of redemption at a sheriff's sale this will have the effect of merger as to the mortgagor although not as to a mere encumbrancer (*b*).

In British Columbia it has been held that a conveyance of the equity of redemption by a mortgagor to a mortgagee of lands does not constitute a discharge of the mortgage by merger, unless it is made to appear that such a result was intended by the parties; and when a mortgagee applies to register a conveyance of the equity of redemption the registrar should not mark the mortgage merged unless at the request of the mortgagee (*c*).

The purchaser of an equity of redemption took an assignment of a charge upon the property and paid off the encumbrancer. It was held that the charge was not extinguished for there was no evidence in the deed or in the circumstances of an intention to extinguish the charge, and it was for the purchaser's benefit that it should be kept alive (*d*).

If a tenant for life pays off a charge on the inheritance, he is *prima facie* entitled to that charge for his own benefit, but he may, if he thinks proper, exonerate the estate. In the absence of evidence to the contrary, the presumption is that he pays the charge for his own benefit and not for the benefit of the persons entitled in remainder, notwithstanding that he makes no declaration and does no act to demonstrate his intention (*e*). A. B., being tenant for life of the testator's real estate, subject to a charge, and absolutely entitled to the residuary personal estate, paid off the charge and obtained

(*b*) *Woodruff v. Mills*, 1860, 20 U.C.R. 51; R.S.O. 1914, c. 80, s. 33 (see chapter 16, *Execution Creditors of the Mortgagor*, §154)

(*c*) *In re Major*, 1897, 5 B.C.R. 244.

(*d*) *Liquidation Estates Purchase Co. v. Willoughby*, [1898] A.C. 321. See also the discussion of the subject matter of §204 in *Manks v. Whiteley*, [1912] 1 Ch. 735, at pp. 760 ff.; S.C. reversed, on other grounds, *sub nom. Whiteley v. Delaney*, [1914] A.C. 132.

(*e*) *Adams v. Angell*, 1877, 5 Ch.D. 634, at p. 645

releases. At the time he conceived that as residuary legatee he was liable to pay the amount out of the personal estate, which was sufficient for the purpose, and nothing was done to keep the charge on foot. After the death of the tenant for life, it being determined that the amount of the charge was a primary charge on the real estate, it was held that it still subsisted as a charge on the settled estate for the benefit of the personal representatives of the tenant for life (*f*).

§205. *Purchase with notice of subsequent charges.*

In *Toulmin v. Steere* (*g*), Grant, M.R., enunciated the rule that the purchaser of "an equity of redemption cannot set up a prior mortgage of his own, nor, consequently, a mortgage which he has got in, against subsequent incumbrances of which he had notice," the notice in that case being constructive. But to a certain extent this is clearly wrong, as the purchaser can by actual intention keep alive a charge which he has got in, or which he has paid off, against charges of which he has notice (*h*). This leaves *Toulmin v. Steere* as an authority merely

(*f*) *Burrell v. Earl of Egremont*, 1843, 7 Beav. 205, 18 R.C. 540; cf. *In re Harvey, Harvey v. Hobday*, [1896] 1 Ch. 137; *Lord Gifford v. Lord Fitzharding*, [1899] 2 Ch. 32.

(*g*) 1817, 3 Mer. 210, at p. 224. The paragraph in the text relating to this case follows substantially 21 Halsbury, *Laws of England*, p. 325, note (o), except that since that note was written the judgments in the House of Lords in *Whiteley v. Delaney*, [1911] A.C. 132, have cast further doubt upon the correctness of the rule enunciated in *Toulmin v. Steere*. See also the adverse criticism of *Toulmin v. Steere* in the dissenting judgment of Fletcher Moulton, L.J. in the Court of Appeal in the same case (*sub nom. Manks v. Whiteley*, [1911] 1 Ch. 735, at pp. 759 ff.); cf. article by A. E. Randall in 28 L.Q.R. 348 (Oct., 1912), in which it is said that the Court of Appeal had, "by a majority, rescued *Toulmin v. Steere* from a position of suspended animation, and reinstated it to its position of a living danger to conveyancers." As to the actual decision in *Whiteley v. Delaney*, see §202.

(*h*) *Adams v. Angell*, 1877, 5 Ch.D. 634.

that, in the absence of actual intention, whether expressed or shown by the circumstances, the presumption against merger will not apply in his favour, and beyond this it will not be extended (i). But even to this extent it is opposed to principle. There is no reason for giving the second mortgagee a benefit at the expense of the purchaser of the equity of redemption who is under no liability to pay him (j); and the decision has been frequently questioned (k).

(i) *Stevens v. Mid-Hants Ry. Co.*, 1873, L.R. 8 Ch. 1064; *Adams v. Angell*, *supra*.

(j) *Stevens v. Mid-Hants Ry. Co.*, *supra*.

(k) See e.g., *Watts v. Symes*, 1851, 1 DeG. M. & G. 240, at p. 244; *Thorne v. Cann*, [1895] A.C. 11, at p. 16, 18 R.C. 552, at p. 557; *Liquidation Estates Purchase Co. v. Willoughby*, [1896] 1 Ch. 726, at p. 734, S.C. [1898] A.C. 321. In the Privy Council the doctrine of *Toulmin v. Steere* has been held not to be applicable in a court administering rules of justice, equity and good conscience, apart from technical conveyancing considerations. *Gokuldoss Gopaldoss v. Rambux Seochand*, 1884, L.R. 11 Ind. App. 126.

PART VI.

MORTGAGE ACTIONS.

CHAPTER XXII.

ACTION FOR POSSESSION.

- §211. Concurrent remedies of the mortgagee, p. 349.
- §212. Possession as between mortgagor and mortgagee, p. 350.
- §213. Mortgagee's right in absence of redemise, p. 353.
- §214. Proviso for quiet enjoyment until default, p. 355.
- §215. Rights of mortgagor in possession, p. 358.
- §216. Mortgagee's rights against third parties, p. 360.
- §217. Possession under the Land Titles Acts, p. 360.

§211. *Concurrent remedies of the mortgagee.*

After default had been made under a mortgage, the mortgagee might, before the Judicature Act, pursue his various remedies by action at law or suit in equity concurrently. He might sue in equity for foreclosure or sale, and at the same time bring an action at law on the covenant for payment (a) and an action for possession of the mortgaged land (b).

Since the Judicature Act and under the present rules of practice he may ask for all these remedies in one action, and it will usually be in connection with an action for foreclosure or sale that he will seek to recover possession (c).

It is provided in Ontario by rule 460 as follows:

460. A mortgagee may in an action claim foreclosure of the equity of redemption or a sale of the mortgaged premises, and pay-

(a) *Lockhardt v. Hardy*, 1846, 9 Beav. 349, 18 R.C. 434. See chapter 23, *Action on the Covenant*.

(b) *Booth v. Booth*, 1742, 2 Atk. 313.

(c) See chapter 24, *Action for Foreclosure or Sale*, where the procedure in a combined mortgage action is outlined.

ment of the mortgage debt by any person personally liable therefor and possession of the mortgaged premises.

In addition to his remedies by action a mortgagee may have some remedies which are available without application to the court (*d*).

In this chapter will be discussed the right to possession as between the mortgagor and the mortgagee and as between the mortgagor or mortgagee and third parties. The right to possession may be enforced by action if the person in possession wrongfully refuses to give up possession. If the mortgagee is or becomes entitled to possession against the mortgagor he may of course bring an action for possession without seeking a sale or sale, and whether he is entitled to foreclosure or sale or not.

§12. *Possession as between mortgagor and mortgagee.*

In the absence of any provision in the mortgage reserving the right of possession to the mortgagor or of any agreement express or implied to the same effect, a legal mortgagee is entitled, after the making of the mortgage and by virtue of the assignment to him of the legal estate, to take possession of the mortgaged lands at any time (*e*). It is usual, however, in Ontario mortgages to insert in a mortgage a proviso that the mortgagor shall have quiet possession of the lands (*f*), and in such case, until the mortgagee demands possession, the mortgagor's possession is lawful (*g*).

On the other hand, as an equitable mortgage does not convey the legal estate (*h*) the former rule was that an equitable

¹ See chapter 31, *Sale under Power of Sale*; chapter 32, *Appointment of Receiver*; chapter 33, *Attornment and Distress*.

² See §213, *infra*. Cf. chapter 2, *Mortgage at Common Law*, §12.

³ See §214.

⁴ See §215.

⁵ See chapter 5, *Equitable Mortgages*, §41.

mortgagee was not entitled to bring an action of ejectment against the mortgagor. An action for possession, however, is not now liable to be defeated on the ground of the absence of the legal estate, it being sufficient for the purpose of the action that the plaintiff should be entitled to possession as against the defendant (i). Therefore, where a second mortgage has been created by conveyance of the equity of redemption, and the first mortgagee does not take possession, the second mortgagee, since he is entitled to possession as against the mortgagor, has probably a right to take possession (j), and certainly has such right if the mortgage expressly gives it to him (k). In the case of other equitable mortgagees, the equitable equivalent to the taking of possession is the appointment by the court of a receiver of the rents and profits (l).

(i) A mortgagee is entitled to possession as between himself and the mortgagor, and the land is in the occupation of the mortgagor or of any other person whose title is not superior to that of the mortgagee (m), the mortgagee may enter on the

(j) *General Finance, Mortgage and Discount Co. v. Liberator Permanent Benefit Building Society*, 1878, 10 Ch.D. 15, at p. 24.

(k) See 21 Halsbury, *Laws of England*, p. 190, note (i), where it is cited that the *dictum* of North, J. in *Garfit v. Allen*, *Allen v. Long*, 1887, 37 Ch.D. 48, at p. 50, that an equitable mortgagee cannot take possession, applies only where, as in that case, the encumbrance is by mere charge. See, however, *Vacuum Oil Co. v. Ellis*, [1914] 1 K.B. 693, at p. 703.

(l) *Ocean Accident and Guarantee Corporation v. Inford Gas Co.*, [1905] 2 K.B. 193. It is usual in Ontario to insert in a mortgage a covenant on the mortgagor's part that on default taking place the mortgagee shall have quiet possession. See §214, *in loco*.

(i) See chapter 32, *Appointment of Receiver*, §351.

(m) For instance, a tenant under a lease made after the mortgage without the authority of the mortgagee. See chapter 15, *Leases of Mortgaged Land*, §143.

land if he can do so peaceably (*n*) or may bring an action for possession (*o*). If the land is in the occupation of a tenant under a lease which is binding on the mortgagee, the mortgagee may take possession by requiring the tenant to pay rent to him (*p*). In either case, after obtaining possession, he becomes liable to account as a mortgagee in possession (*q*).

A puisne mortgagee's right to possession or to the appointment of a receiver is subject to the right of the prior mortgagee to take possession, but if the prior mortgagee takes possession the puisne mortgagee may require him to pay over the surplus rents and profits (*r*). If a receiver has been appointed on the application of a puisne mortgagee, the prior mortgagee is not entitled to recover possession without the leave of the court unless the order appointing the receiver has reserved to the prior mortgagee the right to take possession (*s*).

If a mortgagee takes possession the mortgagee may redeem without giving notice or paying interest in lieu of notice, the taking of possession being considered as a demand for payment (*t*).

The right to take possession or to bring an action for possession may be barred by lapse of time, but an action for possession by a mortgagee to put himself in possession of land which he is to hold as a pledge subject to account must be distinguished from an action for possession by a mortgagee who has already obtained a final order of foreclosure and who is

(*n*) *Doe d. Fisher v. Giles*, 1829, 5 Bing. 421. In order to gain entrance the mortgagee may break open an outer door of a house which is unoccupied or has been vacated. *Lows v. Telford*, 1876, 1 App. Cas. 414; *Doe d. Bryant v. Cunard*, 1843, 2 Kerr (N.B.) 193.

(*o*) *Doe dem. Garrod v. Olley*, 1840, 12 A. & E. 481.

(*p*) See chapter 15, *Lessee of Mortgaged Land*, §142.

(*q*) See chapter 28, *Mortgage in Possession*, §301.

(*r*) *Parker v. Calcraft*, 1821, 6 Madd. 11.

(*s*) See chapter 32, *Appointment of Receiver*, §351.

(*t*) *Bovill v. Endle*, [1896] 1 Ch. 648; and see chapter 25, *Action for Redemption*, §252.

therefore the absolute owner free from the mortgagor's equitable right to redeem. In the latter case the final order constitutes a new starting point for the running of the statute of limitations (*u*).

The summary procedure by which a landlord in Ontario may obtain possession against an overholding tenant as provided by the Landlord and Tenant Act, R.S.O. 1914, c. 55, is not available to a mortgagee who seeks to obtain possession against the mortgagor where no relation of landlord and tenant exists between the parties, and in any case the power given to the court by the statute ought not to be exercised so as unfairly to deprive the mortgagor or other persons interested in the mortgaged land of the ordinary methods of trial and the ordinary right of appeal after trial (*v*).

§213. *Mortgagee's right in absence of redemise.*

Where a person having an estate upon condition continues to hold after the condition is broken, he is, until the remainderman enters, a tenant at sufferance (*w*), but if he is in possession by agreement with the owner so long as it pleases both parties, he is a tenant at will (*x*). This distinction in terms has been applied to the case of a mortgagor who remains in possession notwithstanding that the right to possession is not reserved to him by the mortgage, and that the mortgagee by virtue of the conveyance of the land to him is therefore en-

(*u*) *Pugh v. Heath*, 1882, 7 App. Cas. 235, at p. 238, 16 R.C. 376, at p. 391. See chapter 26, *Limitation of Actions*, §274.

(*v*) *Re Mitchell and Fraser*, 1917, 40 O.L.R. 389, 38 D.L.R. 597; *In re Reeve*, 1867, 4 O.P.R. 27; *Chalmers v. Freedman*, 1909, 18 M. R. 523.

(*w*) *Allen v. Hill*, 1591, Cro. Eliz. 238, 25 R.C. 1. A tenancy by sufferance is when a person, who has originally come into possession by a lawful title, holds such possession after his title is determined. *Williams, Real Property*, 21st ed., p. 500.

(*x*) *Richardson v. Langridge*, 1811, 4 Taunt. 128, 25 R.C. 3.

titled to take possession at any time after the making of the mortgage. If the mortgagor so remains in possession without the consent express or implied of the mortgagee he is said to be a tenant at sufferance, but if the mortgagor remains in possession with the consent express or implied of the mortgagee he is said to be a tenant at will. In the latter case he is not, however, properly tenant at will of the mortgagee, for he is not to pay rent, and he is merely like a tenant at will (*y*). The analogy is misleading and it is perhaps more correct to say that the mortgagor remains at the will of the mortgagee or that the mortgagee is entitled at any moment to treat him as a trespasser (*z*). He is not a tenant at will of the mortgagee within the meaning of the statute of limitations (*a*). Furthermore the utility of the distinction in terminology is not obvious as the mortgagor who remains in possession with the consent of the mortgagee and is called a tenant at will appears to be in no different position from the mortgagor who remains in possession without the consent of the mortgagee and who is called a tenant at sufferance so far as the termination of his possession is concerned. The mortgagee may, without previous demand of possession, bring an action for possession against the so-called tenant at will (*b*).

In a case where, notwithstanding the omission of any redemption clause, it sufficiently appeared from the provisions of

(*y*) *Moss v. Gallimore*, 1779, Doug. 279, at pp. 282-3, 13 R.C. 403, at p. 408; *Birch v. Wright*, 1786, 1 T.R. 378, at p. 382, 15 R.C. 626, at p. 631. See also the notes in 1 Smith, *Leading Cases*, 12th ed., pp. 597 ff., to the cases of *Keech v. Hall* and *Moss v. Gallimore*.

(*z*) 21 Halsbury, *Laws of England*, p. 191, note (c).

(*a*) See the Limitations Act, R.S.O. 1914, c. 75, s. 6, sub-ss. 7, 8, in chapter 26, *Limitation of Actions*, §271.

(*b*) Cf. 21 Halsbury, *Laws of England*, p. 159; *Doe dem. Roby v. Maissey*, 1828, 8 B. & C. 767, at p. 768; *Doe dem. Higginbotham v. Barton*, 1840, 11 Ad. & E. 307, at p. 314; *Lows v. Telford*, 1876, 1 App. Cas. 414, at pp. 425, 426; *Mann v. English*, 1876, 38 U.C.R. 240, at p. 246.

the mortgage and the rules and regulations of the mortgagee company that it was the intention of the parties that the mortgagor should remain in possession until default, it was held that until default the mortgagor's possession should not be disturbed (c). It has, however, been held that where there is no redeemise clause but merely a covenant on the mortgagor's part that it should be lawful for the mortgagee to enter after default (d) and a further covenant for further assurance in case of default, the mortgagee is entitled to possession immediately after the execution of the mortgage, there being no implication that the mortgagor shall be entitled to possession in the interval between the execution of the mortgage and default (e).

§214. *Proviso for quiet enjoyment until default.*

After the making of a mortgage by which the land is conveyed to the mortgagee, the mortgagor is not entitled to possession against the mortgagee unless the right to possession is reserved to the mortgagor (f). It is customary, however, in Ontario to insert in a mortgage a proviso for quiet enjoyment by the mortgagor until default. The short form of proviso generally adopted is that contained in the Short Forms of Mortgages Act (g) as follows:

Provided that until default of payment the mortgagor shall have quiet possession of the said lands.

If the mortgage is expressed to be made in pursuance of the statute a proviso in the foregoing form has the same effect as if it were in the following terms (h):

(c) *Superior Savings and Loan Society v. Lucas*, 1879, 44 U.C.R. 106.

(d) Cf. form of covenant for quiet possession after default in §214, *infra*.

(e) *Doc dem. Roylance v. Lightfoot*, 1841, 8 M. & W. 553.

(f) See §§212 and 213, *supra*.

(g) R.S.O. 1917, c. 117, schedule B, clause 17.

(h) See chapter 35, *Short Forms of Mortgages Act*, §381.

And provided also, and it is hereby further expressly declared and agreed by and between the parties to these presents, that until default shall happen to be made of or in the payment of the said sum of money hereby secured or mentioned, or intended so to be, or the interest thereof, or any part of either of the same, or the doing, observing, performing, fulfilling or keeping some one or more of the provisions, agreements or stipulations herein set forth, contrary to the true intent and meaning of these presents, it shall and may be lawful to and for the said mortgagor his heirs, executors, administrators and assigns, peaceably and quietly to have, hold, use, occupy, possess and enjoy the said lands, tenements, hereditaments, and premises hereby conveyed or mentioned, or intended so to be, with their and every of their appurtenances, and receive and take the rents, issues and profits thereof to his and their own use and benefit, without let, suit, hindrance, interruption, or denial of or by the said mortgagee, his heirs, executors, administrators or assigns, or of or by any other person or persons whomsoever lawfully claiming, or who shall, or may lawfully claim by, from, under or in trust for him, her, them or any or either of them.

It is also customary in Ontario to insert in a mortgage the following short form of covenant on the mortgagor's part:

And that on default the mortgagee shall have quiet possession of the said lands (i), free from all encumbrances (j).

If the mortgage is expressed to be made in pursuance of the Short Forms of Mortgages Act, a covenant in the foregoing terms has the same effect as if it were in the following terms (k):

And also, that from and after default shall happen to be made of or in the payment of the said sum of money, in the above proviso (l) mentioned, or the interest thereof, or any part thereof, or of or in the doing, observing, performing, fulfilling, or keeping of some one or more of the provisions, agreements or stipulations in the said above proviso particularly set forth, contrary to the true intent and

(i) Short Forms of Mortgages Act, R.S.O. 1937, c. 117, schedule B, clause 7.

(j) *Ibid.*, clause 8.

(k) See chapter 35, *Short Forms of Mortgages Act* §381.

(l) The proviso referred to is that which provides that the mortgage shall be void on payment of the mortgage money. The usual form of this proviso is given in chapter 19, *Discharge or Reconveyance*, §181.

meaning of these presents, and of the said proviso, then, and in every such case, it shall and may be lawful to and for the said mortgagee, his heirs, executors, administrators and assigns, peaceably and quietly to enter into, have, hold, use, occupy, possess and enjoy the aforesaid lands, tenements, hereditaments, and premises hereby conveyed or mentioned or intended so to be, with their appurtenances, without the let, suit, hindrance, interruption or denial of him the said mortgagor, his heirs, executors, administrators or assigns or any other person or persons whomsoever (*m*).

And that free and clear and freely and clearly acquitted, exonerated and discharged of and from all arrears of taxes and assessments whatsoever due or payable upon or in respect of the said lands, tenements, hereditaments and premises or any part thereof, and of and from all former conveyances, mortgages, rights, annuities, debts, executions and recognizances, and of and from all manner of other charges or encumbrances whatsoever.

If a mortgage contains a proviso for quiet enjoyment by the mortgagor until default, the mortgagee will be liable in damages if he enters before default (*n*). The proviso operates as a redemise to the mortgagee (*o*), but on default the mortgagee is entitled to enter without previous notice or demand (*p*).

If by the operation of an attornment clause the mortgagor expressly becomes tenant to the mortgagee, either at will or from year to year, at a rent, then he will have the ordinary right to possession of any such tenant, except in so far as such right may be qualified by the mortgage itself in giving

(*m*) Under this clause the mortgagee may take possession on default and make any lease which will not interfere with the mortgagor's right to redeem. *Brethour v. Brooke*, 1893, 21 O.A.R. 144, 23 O.R. 658. See chapter 15, *Lessee of Mortgaged Land*, §144.

(*n*) *Moore v. Shelley*, 1883, 8 App. Cas. 285.

(*o*) *Wilkinson v. Hall*, 1837, 3 Bing. N.C. 508. See also the notes to *Moss v. Gallimore* and *Keech v. Hall* in 1 Smith, *Leading Cases*, 12th ed., pp. 597 ff. As to the validity of a tenancy for a term exceeding three years created otherwise than by deed executed by the lessor, see chapter 33, *Attornment and Distress*, §362.

(*p*) *Doe dem. Garrod v. Olley*, 1840, 12 A. & E. 481; *Brethour v. Brooke*, *supra*.

right to entry without notice on default in payment or non-observance of covenants (*q*).

§215. *Rights of mortgagor in possession.*

The position of a mortgagor who remains in possession after the making of the mortgage, if the mortgage does not reserve to him the right of possession, or after default, if the mortgage provides that he may retain possession until default, is anomalous. The mortgagee is entitled to take possession at any time (*r*), but until the mortgagee demands possession the mortgagor's possession is rightful and not by wrong, and he is entitled to the rents and profits of the land without account (*s*). The mortgagor is not a trespasser, but he is not entitled to possession as against the mortgagee.

It is provided in Ontario by the Mortgages Act, R.S.O. 1914, c. 112, s. 5, as follows (*t*):

5. A mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land, as to which no notice of his intention to take possession or to enter into receipt of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession, or sue or distrain for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person, and in that case he may sue or distrain jointly with such other person.

Formerly, if a mortgagor was entitled to possession against the mortgagee under a proviso giving him the right

(*q*) Armour, *Real Property*, 2nd ed., p. 186. As to attornment clause, see chapter 33, *Attornment and Distress*, §362.

(*r*) See §212, *supra*.

(*s*) Heath v. Pugh, 1881, 6 Q.B.D. 345, at p. 359, 16 R.C. 376, at p. 383; S.C. *sub nom.* Pugh v. Heath, 1882, 7 App. Cas. 235, 16 R.C. 376. As to the mortgagor's right to the rents and profits, see chapter 27, *Accounting between Mortgagor and Mortgagee*, §294.

(*t*) This provision was prior to 1914 contained in the Judicature Act, it having been adopted in 1881 from the English Judicature Act,

to possession till default, he could maintain an action against a third party for possession or for injury done to the property, but he could not maintain such action if the mortgage was in default (*u*). Similarly in equity a mortgagor in receipt of the rents and profits has been held entitled to sue, without making the mortgagee a party, for an injunction to prevent injury to the property (*v*).

Under the statute a mortgagor may maintain an action even after default if no notice has been given by the mortgagee of his intention to take possession, but after the giving of such notice the mortgagor's right of action ceases (*w*).

The court will entertain actions for the protection of the mortgaged property at the suit of the mortgagor alone, but will add the mortgagee as a party if it appears that it is necessary to do so in order to prevent the latter from being prejudiced (*x*).

The statute above quoted does not give to a mortgagor in possession of land, subject to a lease, the right to re-enter for breach of the covenants in a lease (*y*), or the right to sue the lessee for damages for the breach of a covenant to repair (*z*).

1873, s. 25, sub-s. 5. The last 14 words of the section are not contained in the English statute.

(*u*) *Rogers v. Dickson*, 1861, 10 U.C.C.P. 481; *Ford v. Jones*, 1862, 12 U.C.C.P. 358.

(*v*) *Fairclough v. Marshall*, 1878, L.R. 4 Ex. 37; *Van Gelder, Apsimon & Co. v. Sowerby Bridge United District Flower Co.*, 1890, 44 Ch.D. 374.

(*w*) *Armour, Real Property*, 2nd ed., 187; see also the cases referred to in the next following note.

(*x*) *In re Nickle and the Town of Walkerton*, 1886, 11 O.R. 433; *Platt v. Grand Trunk Ry. Co.*, 1886, 12 O.R. 119; *McMullen v. Free*, 1887, 13 O.R. 57.

(*y*) *Matthews v. Usher*, [1900] 2 Q.B. 535.

(*z*) *Turner v. Walsh*, [1909] 2 K.B. 484. The mortgagor would, however, have such right in England under the Conveyancing Act, 1881, s. 10, [and in Ontario under the Landlord and Tenant Act, R.S.O. 1914, c. 155, s. 5]. *Ibid.*

§216. Mortgagee's rights against third parties.

When a mortgagee becomes entitled to possession as between himself and the mortgagor, he may maintain an action for possession against the mortgagor or the mortgagor's tenant under a lease made subsequently to the mortgage without the authority of the mortgagee or any other person not holding under a paramount title (*a*).

So long as the mortgagor or some one claiming under him is in actual possession, the mortgagee cannot maintain an action for trespass against a third party (*b*), but if the land is in a state of nature or has been left vacant by the mortgagor before a title of possession has been acquired by anyone, and the mortgagee has a right of entry, the constructive possession is in the mortgagee and he is entitled to bring an action for trespass (*c*).

After entry by a mortgagee his right of possession relates back to the time at which his legal right to enter accrued, so as to enable him to support an action against a wrong-doer for a trespass committed at a time antecedent to the entry (*d*).

§217. Possession under the Land Titles Acts.

It is provided in Ontario by the Land Titles Act, R.S.O. 1914, c. 126, s. 33, as follows:

33. Subject to any entry to the contrary on the register the registered owner of a registered charge, for the purpose of obtaining satisfaction of any money due to him under the charge, at any time

(*a*) See §212, *supra*.

(*b*) *Wheeler v. Montefiore*, 1841, 2 Q.B. 133; cf. *Heck v. Knapp*, 1861, 20 U.C.R. 360.

(*c*) *Delaney v. Canadian Pacific Ry. Co.*, 1891, 21 O.R. 11; *Mann v. English*, 1876, 38 U.C.R. 240. As to title by possession in the case of vacant lands, see chapter 26; *Limitation of Actions*, §270.

(*d*) *Ocean Accident and Guarantee Corporation v. Ilford Gas Co.*, [1905] 2 K.B. 493, approving and applying *Burnett v. Guildford (Earl)*, 1855, 11 Ex. 19.

during the continuance of his charge, may enter upon the land charged, or any part thereof, or into the receipt of the rents and profits thereof, subject nevertheless to the right of any persons appearing on the register to be prior encumbrancers, and to the liability attached to a mortgagee in possession.

A mortgagee taking possession under this provision is not as a legal mortgagee taking possession of his own fee simple: he has nothing but the statutory right to enter and hold possession, and his interest when he has taken possession seems to be something like the estate of a tenant by *eligit*, that is, he may hold the land until the debt is satisfied out of the rents and profits (*e*).

In Manitoba the Real Property Act, in addition to providing that a *first* mortgagee shall have the same rights and remedies at law and in equity as he would have had if the legal estate had been actually vested in him with a right in the owner of the land of quiet enjoyment until default (*f*), provides specifically that after default a mortgagee or encumbrancee may enter into possession of the mortgaged land by receiving the rents and profits thereof or may bring action to recover the land either before or after entry or distress and either before or after sale under power of sale in the same manner as if the money had been secured by an assurance of the legal estate (*g*).

In Saskatchewan it is provided by the Land Titles Act, 1917, as follows (*h*):

108.—(1) In every case where:

(a) a registered mortgage or encumbrance contains a covenant authorizing the mortgagee or encumbrancee, upon default in payment of the principal, interest, annuity or rent

(c) Williams, Real Property, 21st ed., p. 675.

(f) R.S.M. 1913, c. 171, s. 116, quoted in chapter 10, *The Land Titles Acts*, §99.

(g) R.S.M. 1913, c. 171 s. 114.

(h) Sask. statutes, 1917 (2nd sess.), c. 18, s. 108.

charge or any part thereof thereby secured or in the observance of any covenant expressed or by this Act declared to be implied therein, to enter into possession of the lands and receive and take the rents, issues and profits thereof;

- (b) such default has been made and has continued for the space of one calendar month or for such longer time as may be expressly limited for the purpose;
- (c) The mortgagee or encumbrancee has registered notice of his intention so to do, and has served copies of such notice upon the mortgagor or encumbrancer, his executors, administrators or assigns and upon every other person appearing by the records of the land titles office at the date of the registration of the notice to have any mortgage, encumbrance or lien upon an estate, right or interest in or to the lands subsequent to such first named mortgage or encumbrance (i);

the mortgagee or encumbrancee may, without the further consent or concurrence of any person interested, enter into possession of the lands and receive and take the rents, issues and profits thereof, and whether in or out of possession may lease the same or any part thereof as he may see fit.

(2) The term covered by a lease or leases made under the preceding [sub.] section shall not extend in all beyond a period of five years.

(3) The mortgagee or encumbrancee may by such notice require the mortgagor or owner or such other interested persons as aforesaid to pay within a time to be specified in the notice the money then due or owing on the mortgage or encumbrance, or to observe the covenants therein expressed or implied, as the case may be, and may notify them that all remedies competent will be enforced unless such default be remedied.

The Manitoba statute (j) contains provisions similar in effect to the section just quoted except that the rights thereby conferred are not made conditional upon there being a covenant in the mortgage in the terms of clause (a), and there is no provision limiting the number of years for which a lease or lease may be made.

(1) The service must be personal unless the registrar otherwise directs. See s. 113 quoted in chapter 24, *Action for Foreclosure or Sale*, §246.

(j) R.S.M. 1913, c. 171, s. 118.

In Alberta the Land Titles Act (k) contains provisions similar in effect. Like the Manitoba statute it omits the condition expressed in clause (a) of the Saskatchewan statute and the limitation as to the number of years for which a lease or leases may be made, but it differs from the Manitoba and the Saskatchewan statutes with regard to the contents of the notice to be filed and served. Instead of providing that the mortgagee may notify the mortgagor or other interested parties "that all remedies competent will be enforced unless such default be remedied," it provides that the notice "shall contain a statement that in case default continues for the further space of two calendar months from the date of service of the notice, the mortgaged lands may be sold under the provisions of *The Land Titles Act*," and "may also declare the intention of the mortgagee or encumbrancee to make an application for foreclosure" in case the sale proves abortive and default is continued for six months after the time for payment (l).

The power to lease the mortgaged land or any part thereof provided for in the statutes above mentioned means doubtless a power to make a lease or leases which will not interfere with the mortgagor's right to redeem—a power analogous to that possessed by a mortgagee in Ontario under a covenant contained in a mortgage made pursuant to the Short Forms of Mortgages Act "that on default the mortgagee shall have quiet possession of the said lands" (m). The power in question is merely one form of the power to enter into possession and to receive and take the rents and profits of the land for the purpose of reducing or paying off the mortgagee's claim.

(k) Sub-ss. 1, 2, 3, 4 & 5 of s. 62a, as enacted by 1915, c. 3, s. 2.

(l) As to sale and foreclosure under the Land Titles Acts, see chapter 24, *Action for Foreclosure or Sale*, §246.

(m) See §214, *supra*, where the extended form of the covenant is set out. See also chapter 15, *Lessee of Mortgaged Land*, §144, where such a power to make leases is distinguished from the power to lease or sell mentioned in the Ontario short form of power of sale.

It would follow that, apart from the express limitation in the statute as to the number of years for which the mortgagee may make a lease, the term should not be unduly long. Possibly must not extend beyond the term of the mortgage.

It is clear under the present Saskatchewan statute that giving the statutory written notice is a necessary preliminary to entering into possession and to leasing. It has been argued that under the Alberta statute, as under the Manitoba statute and the *Manitoba* statute, a notice is not a condition precedent to the exercise of the power of leasing. It is a condition precedent of entering into possession. It is submitted, however, that if the court did not consider that on a reasonable construction of the statutes the statutory notice was intended as a condition precedent of the making of leases as well as of entering into possession, the question is immaterial because the exercise of the power of leasing amounts to entering into possession, notwithstanding the language of the statute by which the mortgagee is authorised "to enter into possession" or "to lease the mortgaged lands".

When a mortgagor made default, and the mortgagee entered into possession and leased the land to the mortgagor for a term, the lease being executed by the mortgagor but not by the mortgagee, it has been held in Saskatchewan that the

(a) Cf. Scott, *Torrens Title Mortgages*, p. 53.

(b) Scott, *Torrens Title Mortgages*, p. 52. The ground of the distinction is that the statutes in question provide that the mortgagee "may forthwith after giving" the notice prescribed enter into possession, etc., and "may make any lease," etc.

(c) See chapter 28, *Mortgage, in Possession*, §301, as to the circumstances in which a mortgagee is deemed to be in possession. Scott, *op. cit.*, p. 54, expresses a guarded opinion in the same sense on this point.

entering into possession and the making of the lease were not inoperative and void as against execution creditors, although no notice was registered or served under the statute, because the mortgagor acquiesced in the taking of possession and leasing and none of the persons to whom notice is required by the statute to be given was affected by what was done and the assistance of the statute was not invoked by the mortgagee (q).

It is provided in Manitoba by the Real Property Act, R.S.M. 1913, c. 171, s. 84, that no action of ejectment or other action for the recovery of any land under the new system shall lie against the registered owner for the estate or interest in respect of which he is so registered, except in the case, *inter alia*, of a mortgagee or encumbrancee as against a mortgagor or encumbrancer in default, and that in such case a mortgagee shall be entitled to bring such action notwithstanding the provisions of s. 108 (r).

The Land Titles Acts of Saskatchewan, Alberta and the Northwest Territories (s) provide that no action of ejectment or other action for the recovery of land for which a certificate of title has been granted shall lie against the owner except in the cases, *inter alia*, of a mortgagee as against a mortgagor in default and of an encumbrancee as against an encumbrancer in default.

(q) *Rollefson v. Olson and the Mutual Life Ass. Co.*, 1915, 8 S.L.R. 143, 21 D.L.R. 671.

(r) The last mentioned section provides that a mortgage or encumbrance under the new system shall have effect as security, but shall not operate as a transfer of land thereby charged or of any estate or interest therein. Corresponding provisions are contained in the Land Titles Acts of Saskatchewan, Alberta and the Northwest Territories.

(s) Sask. statute: 1917 (2nd sess.), c. 18, s. 159; Alta. statutes, 1917, c. 110, s. 142.

CHAPTER XXIII.

ACTION ON THE COVENANT.

- §221. Personal remedy of the mortgagee, p. 366.
- §222. Covenant for payment, p. 369.
- §223. Who may sue on the covenant, p. 372.
- §224. Who may be sued on the covenant, p. 373.
- §225. When the right to sue arises, p. 375.
- §226. Acceleration of payment, p. 377.
- §227. When the mortgagee is disentitled to sue, p. 383.

§221. *Personal remedy of the mortgagee.*

Prior to the Administration of Justice Act of 1873 in Ontario the remedy for enforcement of immediate payment of the mortgage money was by action at law upon the covenant for payment, and the Court of Chancery had no jurisdiction to entertain a claim upon the covenant for payment, although that court might, after a sale had taken place pursuant to a decree in a suit for foreclosure or sale, order payment of the deficiency by the mortgagor (a). The plaintiff might, however, pursue his various remedies at law and in equity concurrently (b).

By the Ontario Judicature Act, 1881 (c), jurisdiction was vested in one court to give both legal and equitable relief, and under the present rules of practice claims for immediate pay-

(a) *Sawyer v. Robertson*, 1900, 19 O.P.R. 172; cf. *Acadian Loan Co. v. Legere*, 1911, 45 N.S.R. 328. See chapter 24, *Action for Foreclosure or Sale*, §§232, 245.

(b) See chapter 22, *Action for Possession*, §211.

(c) As to the Judicature Act generally, see chapter 4, *Law and Equity in Upper Canada*, §35.

ment and for possession may be combined in one action with a claim for foreclosure or sale (*d*).

A mortgagee may of course still sue on the covenant alone, and if a third party has joined in the mortgage for the purpose of guaranteeing payment, the mortgagee's only remedy against the surety is by action on the covenant or by claiming payment from him in an action for foreclosure or sale. A separate action on the covenant will, however, be regarded as vexatious if there is pending an action for foreclosure or sale in which a judgment for immediate payment might have been asked for and obtained (*e*).

Prima facie a mortgage, other than a Welsh mortgage (*f*), implies a debt and a personal obligation on the part of the mortgagor to pay it. If there is a covenant or bond for its payment it is a specialty debt, if not, it is a simple contract debt (*g*). The personal obligation may, however, be excluded by the terms of the mortgage (*h*).

(*d*) Rule 460. See chapter 24, *Action for Foreclosure or Sale*, §232, where the form of endorsement on the writ of summons is set out and the procedure in the combined action is outlined.

(*e*) *Poulett v. Hill*, [1893] 1 Ch. 277; *Williams v. Hunt*, [1905] 1 K.B. 512; see chapter 24, *Action for Foreclosure or Sale*, §232.

(*f*) See chapter 1, *Introductory*, §2.

(*g*) *King v. King*, 173, 3 P. Wms. 358, 18 R.C. 1; *Ancaster (Duke of) v. Mayer*, 1785, 1 Bro. C.C. 454, at p. 464, 18 R.C. 177, at p. 187; *Yates v. Aston*, 1843, 4 Q.B. 182; *Sutton v. Sutton*, 1882, 22 Ch.D. 511, at p. 515, 16 R.C. 298, at p. 302; 21 Halsbury, *Laws of England*, p. 70. See, however, *Hall v. Morley*, 1853, 8 U.C.R. 584, to the effect that in the absence of a covenant for payment an action of debt will not lie unless there is some evidence of a debt or loan. As to the implied covenant for payment by a person who conveys, and is expressed to convey, as beneficial owner, see chapter 35, *Short Forms of Mortgages Act*, §384. A covenant for payment is implied in a registered charge under the Land Titles Act, R.S.O. 1914, c. 126, s. 31.

(*h*) *McKay v. Howard*, 1883, 6 O.R. 135; *Mathew v. Blackmore*, 1857, 1 H. & N. 762. As to words qualifying or limiting a covenantor's liability on an express covenant for payment, see §222, *infra*.

Where a mortgage contains an acknowledgment of the receipt of mortgage money but no covenant for repayment this does not of itself afford conclusive evidence of a debt, so as to enable a mortgagee or his assignees to maintain an action for its recovery. It was held that where no money was advanced by the mortgagee, but the mortgage was given for debt due by the mortgagor to the mortgagee who, in consideration of getting the mortgage, agreed to release the mortgagor from all personal liability, the plaintiffs who were assignees of the mortgage were not entitled to recover (*i*).

The amount which the plaintiff will ordinarily be entitled to recover in an action on the covenant will be the principal and interest covenanted to be paid and the costs of the action. In special cases the amount recoverable, if any, will be ascertained upon principles discussed in other chapters (*j*).

In Ontario and Manitoba, in the case of a mortgage under the land titles system, as in the case of a mortgage not under that system, and in Saskatchewan and Alberta, an action on the covenant for payment may be entertained by the courts under their ordinary jurisdiction. In Manitoba, in the case of a mortgage under the land titles system, statutory provision is made for sale and foreclosure proceedings being taken in the registrar's office, while in Saskatchewan and Alberta a mortgagee may, at his option, take proceedings in the registrar's office for sale and foreclosure or have recourse to the courts for these remedies (*k*).

(*i*) *London Loan Company v. Smyth*, 1882, 32 U.C.P. 530; *cf. Jackson v. Yeomans*, 1876, 39 U.C.R. 280.

(*j*) See chapter 26, *Limitation of Actions*; chapter 27, *Accounting between Mortgagor and Mortgagee*; chapter 28, *Mortgage in Possession*; chapter 29, *Interest*; chapter 30, *Costs*. See also chapter 3, *Legal Mortgage in Equity*, §25, as to a stipulation for a bonus or other collateral advantage.

(*k*) For the details of the Manitoba, Saskatchewan and Alberta statutes, see chapter 24, *Action for Foreclosure or Sale*, §246.

§222. Covenant for payment.

The form of covenant for payment in ordinary use in Ontario is that contained in schedule B to the *Short Forms of Mortgages Act (l)*, as follows:

That the mortgagor will pay the mortgage money and interest, and observe the above proviso.

If the mortgage is expressed to be made in pursuance of the statute the foregoing covenant has the same effect as if it were in the following terms (m):

That the said mortgagor, his heirs, executors, administrators or some or one of them shall and will well and truly pay or cause to be paid unto the said mortgagee, his executors, administrators or assigns, the said sum of money in the above proviso mentioned, with interest for the same as aforesaid, at the days and times and in the manner above limited for payment thereof, and shall and will in everything well, faithfully and truly do, observe, perform, fulfil and keep all and singular the provisions, agreements and stipulations in the said above proviso particularly set forth, according to the true intent and meaning of these presents, and of the said above proviso.

A mortgagor may by his covenant restrict his liability as to the amount and as to the terms on which the mortgage may be enforced. In a mortgage for \$3,250, which contained the usual printed short form covenant for payment, the following words were added in writing to the covenant: "But before proceeding upon the covenant the mortgagee shall realize upon the lands mortgaged, and the mortgagor shall then be liable only to the amount of \$600 or such lesser sum as will with the net proceeds from the lands make the \$3,250 and interest." The last clause in the mortgage, also added in writing, provided that "in no event shall the personal liability of the mortgagor on his covenant exceed \$600." It was held that the mortgagor was not subject to any liability on the covenant

(l) R.S.O. 1914, c. 117, schedule B, clause 4

(m) See chapter 35, *Short Forms of Mortgages Act*, §381.

until after the mortgagee should have realized upon the lands and then only to the extent of \$600 (*n*).

A trustee or a personal representative who covenants to pay is personally liable even though he covenants as trustee or as executor or administrator (*o*), and even though he adds a proviso that he shall not be personally liable, such a proviso being repugnant to the covenant for payment and therefore void (*p*). A proviso which limits the personal liability without destroying it is, however, valid, as for instance in the case of a covenant to pay out of a certain fund with a proviso that the covenantor shall not be liable after he ceases to be entitled to administer the fund (*q*).

The duly appointed trustees of a congregation, to whom by deed in description the site for a church has been conveyed, and who by that description gives to the vendor, to secure part of the purchase money, a mortgage with the ordinary covenant for payment, are a corporation (*r*) and are not personally liable upon the mortgage although it is signed and sealed by them individually (*s*).

Where a mortgage deed contains a covenant for payment of principal and interest upon a fixed day the principal and interest are two distinct debts, and either may be sued for separately from the other (*t*).

(*n*) *Wilson v. Fleming*, 1893, 24 O.R. 388.

(*o*) *Farhall v. Farhall*, 1871, L.R. 7 Ch. 123, at p. 128; but see *In re Robinson's Settlement*, *Gant v. Hobbs*, [1912] 1 Ch. 717, at pp. 728, 729.

(*p*) *Watling v. Lewis*, [1911] 1 Ch. 414; *Furnivall v. Coombes*, 1843, 5 Man. & G. 736.

(*q*) *Williams v. Hathaway*, 1877, 6 Ch.D. 544; cf. *Matthew v. Blackmore*, 1856, 1 H. & N. 762.

(*r*) Under R.S.O. 1887, c. 237. See now the Religious Institutions Act, R.S.O. 1914, c. 286.

(*s*) *Beaty v. Gregory*, 1897, 24 O.A.R. 325.

(*t*) *Dickenson v. Harrison*, 1817, 4 Price 282, 18 R.C. 474.

It is provided in Ontario by the Division Courts Act, R.S.O. 1914, c. 63, s. 67, as follows:

67.—(1) A cause of action shall not be divided into two or more actions for the purpose of bringing the same within the jurisdiction of the court.

(2) Where a sum for principal, and also a sum for interest, is due and payable to the same person upon a mortgage, bill, note, bond or other instrument, he may notwithstanding anything in this section contained, but subject to the other provisions of this Act, sue separately for every sum so due.

Under this provision it has been held that the mortgagee cannot sue for an instalment of interest upon a mortgage, the amount of the instalment being within the jurisdiction of the division court, when other instalments are due, and the whole amount due exceeds that for which a suit may be brought in the division court (*u*).

An action was brought in a division court on the 2nd November, 1901, for one year's interest due the 1st February, 1901, and interest on interest, amounting together to \$81.50, due on a mortgage, the principal of which was some years overdue. It was held (1) that the interest sued for, being interest *post diem*, as to which there was no covenant to pay, was due to the plaintiff not *qua* interest but only by way of damages, and the case did not come within the provisions of sub-s. 2 of s. 67, and (2) that the plaintiff, if entitled to recover the amount claimed, was entitled to recover as damages interest down to the date of the issue of the summons amounting in all to about \$140, which sum had been divided for the purpose of enabling the plaintiff to sue in the division court as forbidden by the statute (*v*).

(*u*) *Re Real Estate Loan Co. v. Guardhouse*, 1893, 29 O.R. 602, following *Re Clark v. Barber*, 1894, 26 O.R. 47.

(*v*) *Re Phillips v. Hanna*, 1902, 3 O.L.R. 558; cf. *Re McKay v. Clare*, 1910, 20 O.L.R. 344.

§223. *Who may sue on the covenant.*

An assignee of the mortgagee's estate in the land may sue for foreclosure or sale, but to enable a person other than the mortgagee or his personal representative to bring an action for personal payment an assignment of the mortgage debt is necessary (*w*). In other respects, however, the rules as to the persons who are entitled to sue for foreclosure or sale will apply to an action on the covenant. If there are two or more mortgagees, they must both or all be parties to the action as plaintiffs or defendants; if a mortgagee dies entitled to a mortgage his personal representative must be a party, unless the mortgage was vested in the deceased mortgagee and another or others jointly as trustees or otherwise (*x*).

Even if the heirs of the mortgagee are named in the covenant for payment, the personal representatives will not thereby be deprived of their ordinary right to the moneys as being personalty or of the right to sue for the moneys in their own names (*y*).

A *cestui que trust* is entitled to bring an action against his trustee and compel him to perform any particular obligation under the trust. Thus, if the legal estate in the hands of the trustee be distributed by a stranger the *cestui que trust*, though he may not institute legal proceedings in the name of a trustee without his authority, may oblige the trustee, on giving him a proper indemnity, to lend his name for asserting the legal right (*z*).

(*w*) See chapter 11, *Assignee of the Mortgage*, §§101 and 102.

(*x*) See chapter 24, *Action for Foreclosure or Sale*, §233, where the question who should be plaintiffs is more fully discussed. As to the persons entitled to discharge a mortgage, see chapter 19, *Discharge or Reconveyance*.

(*y*) Leith's Real Property Statutes, p. 420. As to the rights of the personal representatives, see chapter 13, *Persons entitled on Death of the Mortgagee*.

(*z*) *Foley v. Burnell*, 1783, 1 Bro. C.C. 277.

As a general rule no one is entitled to enforce a covenant except the covenantee or his assignee or personal representative, but this rule is subject to exception if the covenant is entered into in such circumstances that the covenantee is constituted a trustee for a third party. If A covenants with B expressly as trustee that A will transfer property or pay money to B upon trust for a third party, then in the event of B refusing to enforce the covenant, the third party as *cestui que trust* has in equity the same right to sue A as B would have at common law, for in effect B is constituted a trustee of an executed trust of a legal chose in action (a).

§224. *Who may be sued on the covenant.*

The mortgagor continues to be personally liable under his covenant, although he has conveyed away the equity of redemption in the land. In such a case the mortgagee would be entitled to judgment on the covenant only on the term that upon receiving payment of the amount due from the mortgagor he shall reconvey the property to him subject to the existing equity of redemption (b).

The burden of the covenant to pay the mortgage money does not run with the land and the purchaser of the equity of redemption from the mortgagor will not be liable to the mortgagee; there is no privity of contract between them. So, although the purchaser of the equity of redemption covenants with his transferor to pay the mortgage or by reason of buying

(a) Underhill, *Law of Trusts*, 7th ed., pp. 38, 49; *Fletcher v. Fletcher*, 1844, 4 Hare 67; *Lloyds v. Harper*, 1880, 16 Ch.D. 290; *Gandy v. Gandy*, 1885, 30 Ch.D. 57; *Faulkner v. Faulkner*, 1893, 23 O.R. 252. See also *Mitchell v. City of London Assurance Co.*, 1888, 15 O.A.R. 262, cited in chapter 34, *Fire Insurance*, §373.

(b) *Kinnaird v. Trollope*, 1888, 39 Ch.D. 636. As to the mortgagor's right to an assignment of the mortgage on payment, see chapter 20. As to the effect upon the mortgagee's right to sue of his inability to reconvey the mortgaged property, see §227, *infra*.

the property *cum onere* is under an obligation to indemnify the transferor against the mortgage, the mortgagee, not being in privity with the purchaser, is not entitled to enforce such covenant or obligation unless it has been assigned to him (c).

If the mortgagor is dead his personal representative may be sued and judgment may be recovered out of the assets of the deceased (d).

If the mortgagor is a married woman and the mortgage deed contains a covenant by her to pay, she is not thereby made personally liable, but the covenant operates as a contract binding upon her separate estate as provided by the Married Women's Property Act (e). A judgment against a married woman on the covenant for payment must therefore be qualified (f) in conformity with form 110 (g), which is as follows:

This Court doth order and adjudge that the plaintiff do recover against the defendant the sum of \$ to be levied out of the separate property of the said defendant which she is now or may hereafter be possessed of or entitled to, and any property which she may hereafter while discovert be possessed of or entitled to and not otherwise; but this judgment shall not render available to satisfy the same any separate property which the defendant was or may be restrained from anticipating unless by reason of section 21 of *The Married Women's Property Act*, such property shall be available to satisfy the judgment notwithstanding such restriction.

Where the married woman was merely a trustee for her husband of property purchased by him and conveyed to her and

(c) See chapter 14, *Transfer of the Equity of Redemption*, §§134, 135 and 136. The statement in the text is subject to qualification in Alberta under special statutory provisions, referred to in §134.

(d) As to the pleadings and the form of judgment in an action against an executor or administrator for a debt incurred by the deceased, see Holmsted, *Judicature Act*, 4th ed., 1129. As to a covenant by a personal representative or trustee, see §222, *supra*.

(e) See the provisions of the statute quoted in chapter 2, *Mortgage at Common Law*, §16.

(f) *Scott v. Morley*, 1887, 20 Q.B.D. 120; *McMichael v. Wilkie*, 1891, 18 O.A.R. 464, at p. 472; *Doull v. Doelle*, 1905, 10 O.L.R. 411; *Re Stewart v. Edwards*, 1905, 11 O.L.R. 378.

(g) Appendix to the Consolidated Rules of Practice, Ontario.

she joined with her husband in creating a mortgage upon it, she was held not liable on the covenant, although the mortgagee had no knowledge of her position (*h*).

The court may in certain circumstances direct a mortgage to be made of an infant's interest in land (*i*), but in the case of a mortgage of trust property in which an infant joined along with other *cestuis que trust*, it was held that it was contrary to proper practice to insert a covenant for payment on the part of the infant (*j*).

§225. *When the right to sue arises.*

The right of the mortgagee to sue on the covenant arises when the covenantor is in default according to the terms of the covenant, but the time for payment may be impliedly extended as to the result of subsequent transactions between the parties. By a covenant in a mortgage dated the 4th September, 1857, the mortgagor covenanted and the defendant covenanted as his surety for the payment of the mortgage debt of £450 on the 4th of March, 1858. By a deed dated the 15th December, 1884, the above mentioned mortgage and various other mortgages given by the mortgagor were consolidated, the plaintiff advancing the total sum of £3200 for payment to the various mortgagees of the amounts of their claims, and taking assignments of the mortgage debts and the mortgaged properties, "with the full benefit of the covenants" contained in the various mortgages; and the mortgagor covenanted with the plaintiff for the payment of £3200 on the 19th January, 1885. The defendant was not a party to the deed. It was held that the covenant in the deed necessarily implied that the principal debtor could not be sued for the

(*h*) *Gordon v. Warren*, 1897, 24 O.A.R. 44.

(*i*) See the Infants Act, R.S.O. 1914, c. 153.

(*j*) *Brown v. Grady*, 1899, 31 O.R. 73.

£450 under the covenant in the mortgage of 1857 before the 19th January, 1885, and consequently there had been a giving of time to the principal debtor by which the defendant as surety was discharged from liability (*k*).

If money is payable on a certain day, the debtor has the whole of that day for payment and the creditor is not entitled to commence an action until the following day (*l*). If, however, the debtor has made an assignment for the benefit of his creditors, a debtor whose debt has not accrued due may prove his claim and vote at meetings of creditors, but in ascertaining the amount of the creditor's claim a deduction for interest shall be made for the time which has to run until the claim becomes due (*m*).

Where there is a condition for payment of a sum at a time and at a place certain, the condition is not broken by non-payment at the time unless a demand for payment is made at the place specified (*n*). In other cases, apart from a stipulation to the contrary, a demand is not a condition precedent to the bringing of an action against a principal debtor even if he has covenanted or promised to pay on demand, but it has been held that if a surety covenants or promises to pay on demand, he must be requested to pay before he is sued (*o*).

In case a demand is required by the terms of the contract, a verbal demand is sufficient unless a demand in writing is expressly stipulated for. If a demand is left for the debtor at his place of business there will be no default until the debtor

(*k*) *Bolton v. Buckenham*, [1891] 1 Q.B. 278.

(*l*) *Kennedy v. Thomas*, [1894] 2 Q.B. 759.

(*m*) The Assignments and Preferences Act, R.S.O. 1914, c. 134, s. 26, sub-s. 5.

(*n*) *Thorn v. City Rice Mills*, 1889, 40 Ch.D. 357.

(*o*) *In re Brown's Estate, Brown v. Brown*, [1893] 2 Ch. 300. Generally speaking, even a surety may be sued without previous demand. *Hitchcock v. Humphrey*, 1843, 5 Man. & G. 559.

shall have had a reasonable opportunity of receiving the notice (p).

In case no place is named for payment it is the duty of the mortgagor to seek out the mortgagee and pay him, unless the mortgagee shall have gone abroad after the making of the mortgage; but if the mortgagee was abroad when the contract was made the mortgagor must pay him abroad (q).

§226. *Acceleration of payment.*

An action for foreclosure or sale may be brought so soon as default is made in payment of any part of the principal or interest in the absence of an express or implied provision to the contrary in the mortgage (r), but an action on the covenant for payment will lie only in respect of such instalments of principal or interest as are overdue under the terms of the mortgage.

It is usual in Ontario to insert in a mortgage the short form of acceleration clause contained in schedule B to the Short Forms of Mortgages Act (s), as follows:

Provided that in default of the payment of the interest hereby secured, the principal hereby secured shall become payable.

If the mortgage is expressed to be made in pursuance of the statute the foregoing clause has the same effect as if it were in the following terms (t):

Provided always, and it is hereby further expressly declared and agreed by and between the parties to these presents, that if any default shall at any time happen to be made of or in payment of the interest money hereby secured or mentioned or intended so to be, or any part thereof, then and in such case the principal money

(p) *Massey v. Sladen*, 1868, L.R. 4 Ex. 13.

(q) *Haldane v. Johnston*, 1853, 8 Ex. 689; *Bell v. Antwerp, London and Brazil Line*, [1891] 1 Q.B. 103; *The Eider*, [1893] P. 119.

(r) See chapter 24, *Action for Foreclosure or Sale*, §231.

(s) R.S.O. 1914, c. 117, schedule B, clause 16.

(t) See chapter 35, *Short Forms of Mortgages Act*, §381.

herby secured or mentioned, or intended so to be, and every part thereof shall forthwith become due and payable in like manner and with like consequences and effects to all intents and purposes whatsoever, as if the time herein mentioned for payment of such principal money had fully come and expired, but that in such case the said mortgagor, his heirs, executors, administrators or assigns, shall on payment of all arrears under these presents, with lawful costs and charges in that behalf at any time before any judgment in the premises recovered, or within such time as, by the practice of the Supreme Court, relief therein could be obtained be relieved from the consequences of non-payment of so much of the money secured by these presents, or mentioned, or intended so to be, as may not then have become payable by reason of lapse of time.

It was formerly contended, and in one case it was held that a proviso of this kind was in the nature of a penalty against which equity would relieve (*a*), but it is now well settled that such a provision is to be regarded as the contract of the parties and not in the nature of a penalty against which relief will be granted (*b*).

In *Sterne v. Beck* (*c*) Knight Bruce, L.J. said

The deed provided for payment of the debt by instalments . . . and further provided that in a certain event payment of the debt should be accelerated. It did not provide that the amount payable should be increased, but it provided that instead of being paid at future periods interest up to those periods it should become payable at once interest up to that time. To a proviso of such a nature no equity principles of equity relating to relief in the case of penalty are applicable.

It will be observed that the extended term of acceleration clause contained in schedule B to the 1893 forms of Mortgages Act contains a provision relieving the mortgagor in certain circumstances from the consequences of non-payment. It has been held that the effect of this provision is to give the

(*a*) *Knapp v. Cameron*, 1858, 6 Gr. 559.

(*b*) *Tylee v. Hinton*, 1878, 3 O.A.R. 53, at p. 60; *Graham v. Ross*, 1884, 6 O.R. 154; *Wilson v. Campbell*, 1893, 15 O.P.R. 254; *Leeds and Hanley Theatre of Varieties v. Broadbent*, [1898] 1 Ch. 543; *National Trust Co. v. Campbell*, 1908, 17 M.R. 587; but see *Schwartz v. Williams*, 1915, 35 O.L.R. 33, 27 D.L.R. 733.

(*c*) 1863, 1 DeG. J. & S. 50, at p. 600.

mortgagor the right in every case, except where a judgment has been recovered, to pay the arrears with lawful costs and charges, and to be relieved from the consequences of his default, and that the provision applies to proceedings taken under the power of sale (*x*). The provision also preserves to the mortgagor the benefit of rules of practice enabling him to apply for a stay of proceedings in an action for foreclosure or sale (*y*).

In Manitoba (*z*) and in Saskatchewan (*a*) there are statutory provisions to similar effect relieving the mortgagor from the consequences of default on payment of the arrears and costs at any time prior to the sale or foreclosure, "notwithstanding any provision to the contrary."

After judgment has been recovered in an action on the covenant alone, relief will not be granted. Thus, where by virtue of an acceleration clause the whole of the mortgage money has become due by default of payment of interest, and judgment has been recovered for the whole by the mortgagee against the mortgagor in an action solely upon the covenant for payment contained in the mortgage deed the defendant is not entitled, upon payment of interest and costs, to have the judgment and execution issued thereon set aside (*b*).

In *Wilson v. Campbell* (*c*) Boyd, C. said:

(*x*) *Todd v. Linklater*, 1901, 1 O.L.R. 103.

(*y*) *Todd v. Linklater*, *supra*. Former rules 388, 389, 390, referred to in the judgment have been replaced by rule 485, which is discussed in chapter 24, *Action for Foreclosure or Sale*, §242.

(*z*) The Real Property Act, R.S.M. 1913, c. 171, s. 126. This provision has been held to be applicable to a mortgage under the "old system." *National Trust Co. v. Campbell*, 1908, 17 M.R. 587.

(*a*) Statutes, 1917 (2nd sess.), c. 18, s. 115; *Wasson v. Harker*, 1912, 5 S.L.R. 364, 8 D.L.R. 88; *Canada Trust v. Layton*, 1916, 9 S.L.R. 244, 30 D.L.R. 283. The Saskatchewan provision is quoted in chapter 24, *Action for Foreclosure or Sale*, §248.

(*b*) *Wilson v. Campbell*, 1893, 15 O.P.R. 254.

(*c*) 1893, 15 O.P.R. 254 at p. 258.

"I may note that I do not decide upon what might be done before judgment obtained upon the covenant. That recovery changes the position of the parties—the mortgage passes into a security of record—*transit in rem judicatum*—and the amount then due and payable is no longer secured by the mortgage ("by these presents" as expressed in the statute) but by the judgment of the Court. But the scope and meaning of the extension of the acceleration claim as given in the R.S.O. have not been exhaustively considered."

Even in an action for foreclosure where the acceleration depended not on default in payment of interest but on default in building a house within the time stipulated for the court refused to interfere and granted judgment of foreclosure. The defendant gave a mortgage to the plaintiff in which he covenanted to pay the mortgage money in nine equal annual instalments, and also to build a house on the land within one year, and there was a proviso that the mortgage should immediately become due and payment after default being made in building the house within the time mentioned. No default occurred in payment of the mortgage money, but the house was not built until about a month after the expiry of the first year. It was held that the plaintiff was entitled to insist on a forfeiture of the extended terms of payment in consequence of the breach of covenant as to the erection of the house, and to judgment for redemption or foreclosure (*d*). Relief may be granted against forfeiture for non-payment of rent, and in certain cases for neglect to insure, but no case appears in which relief has been given against such default as that just mentioned (*d*).

Where a mortgage deed contained an agreement that the payment of the principal money thereby secured should not be required by the mortgagees until the expiration of three years from the date of the deed, "if in the meantime every half-yearly payment of interest shall be punctually paid," it was held that payment "punctually" meant payment in the

(*d*) *Graham v. Ross*, 1883, 6 O.R. 154.

day fixed for payment, and that payment nine days after such fixed day was not good payment (*e*).

Where a mortgage payable in ten years contained a proviso that if the mortgagor mortgaged or otherwise encumbered the premises or suffered them to become liable to sale for taxes, the mortgage money should become immediately payable, the court held that an assignment in insolvency, though voluntary, was not such an encumbering of the estate as entitled the mortgagee to call for the mortgage money (*f*).

A mortgage provided for payment of three annual sums of \$2500 each, and contained a special provision that out of the last instalment the mortgagor might retain \$1000 until he received a conveyance of the interest of an infant who, with the mortgagee, executed an agreement to convey when he became of age. There was also an acceleration clause making the whole amount due on default in paying any part. Default having been made in payment of the first annual instalment, it was held that the mortgagee was entitled to sue for foreclosure, but that the acceleration clause did not apply to the postponed payment of \$1000, that the personal judgment should not include this sum, and that the mortgagor would be entitled to a stay of the action on payment of the other portions of the principal together with the accrued interest and the costs (*g*).

It will be observed that the form of acceleration clause provided by the Short Forms of Mortgages Act applies only to the non-payment of interest. If the principal is payable in instalments a special clause may be added providing for acceleration of the whole principal on default in payment of

(*e*) *Leeds and Hanley Theatre of Varieties v. Broadbent*, [1898] 1 Ch. 343.

(*f*) *McKay v. McFarlane*, 1872, 19 Gr. 345.

(*g*) *Thomson v. Willson*, 1915, 51 Can. S.C.R. 307, 23 D.L.R. 468
varying Willson v. Thomson, 1914, 31 O.L.R. 471, 19 D.L.R. 593.

any instalment. From the mortgagee's point of view it would seem to be better to omit the statutory short form altogether and to insert an appropriate special acceleration clause differently worded in order to avoid the application of the relieving provision already mentioned. Where a mortgage provided that if the mortgagors "make default as to any of the covenants or provisions herein contained the principal money secured shall at the option of the mortgagee . . . forthwith become due and payable," and default in payment of taxes took place, it was held that the provision was in effect a qualification of or addition to the statutory clause and that the extended form in schedule B to the Short Forms of Mortgages Act, including the relieving clause, was applicable with the same qualification or addition.^(f)

Where the principal has become due by virtue of the mortgage contract, on default in payment of interest, the mortgagee is not bound to sue for the whole accelerated sum. He may if he chooses seek to recover only the amount that has matured. Where, however, a mortgagee takes proceedings to enforce his security he cannot refuse to accept payment of the whole amount of principal and interest, even although part of it has not matured, but if his proceedings are merely for protecting his security he cannot be compelled to accept payment of moneys not yet due, as the right to accelerate payment for default is at the option of the mortgagee.^(g)

(f) *Schwarz v. Williams*, 1915, 35 O.L.R. 33, 27 D.L.R. 733. The decision in this case is difficult to reconcile with the cases decided as to what qualifications of or additions to the statutory short form of power of sale are authorized by the statute. See chapter 31, *Sale under Power of Sale*, § 107.

(g) *Ex parte Ellis*, [1898] 2 Q.B. 79; *Ex parte Wickens*, [1898] 1 Q.B. 543; *Wickens v. Shuckburgh*, 1898, 78 L.T. 213.

§227. *When the mortgagee is disentitled to sue.*

The mortgagee's action on the covenant may be barred by lapse of time (*j*) or may be extinguished by a release of the equity of redemption (*k*), by a release of the mortgage debt, either under seal or for valuable consideration, or by accord and satisfaction (*l*), or by payment (*m*).

If a mortgagee purchases the equity of redemption at a sale under an execution against the lands of the mortgagor, he must release the mortgage debt (*n*), and generally, whenever, the equity of redemption and the mortgage become united in the same person, the mortgage is extinguished by merger unless there is sufficient evidence of an intention to the contrary on the part of the person in whom the two interests unite (*o*).

If a mortgagee sells the mortgaged lands under his power of sale (*p*), and the proceeds of the sale are insufficient to pay the amount owing on the mortgage, he may sue the mortgagor on his covenant in order to obtain payment of the deficiency (*q*). Similarly if a sale takes place in an action for foreclosure or sale, the mortgagee may obtain an order for payment by the mortgagor of the deficiency (*r*). In such cases the mortgagor is liable to pay notwithstanding that he cannot obtain a reconveyance of the property on payment. Likewise

(*j*) See chapter 26, *Limitation of Actions*, §261.

(*k*) See chapter 3, *Legal Mortgage in Equity*, §29.

(*l*) *Fonkes v. Beer*, 1884, 9 App. Cas. 605, at p. 611.

(*m*) See chapter 25, *Action for Redemption*, §255, as to payment and as to the statutory provision in Ontario by which part performance of an obligation expressly accepted by the creditor in satisfaction or rendered in pursuance of an agreement for that purpose extinguishes the obligation.

(*n*) See chapter 16, *Execution Creditors of the Mortgagor*, §154.

(*o*) See chapter 21, *Merger*, §201.

(*p*) See chapter 31, *Sale under Power of Sale*.

(*q*) *Pegg v. Hobson*, 1887, 14 O.R. 272; *Rudge v. Richens*, 1873, L.R. 8 C.P. 358.

(*r*) See chapter 24, *Action for Foreclosure or Sale*, §245.

if the mortgaged property is lost to the mortgagor by reason of the exercise of a power of sale contained in a prior mortgage or otherwise through the default of the mortgagor, a subsequent mortgagee may recover on the covenant although he cannot reconvey the property on payment being made (*s*).

With the exceptions just noted, the mortgagee is not entitled to enforce payment personally by the mortgagor unless he is in a position to reconvey the mortgaged property (*t*). The mortgagee is not, however, disabled from suing where he is in a position to restore the whole of the mortgaged land, although owing to the removal or destruction of a building on the land the property is not in the condition in which it was when the mortgagee took possession, unless, *scilicet*, the building is of such a character that compensation in money, to which the mortgagor in such a case would be entitled, would not be an adequate indemnity (*v*).

Where the mortgagee with the concurrence of the person who after the mortgage was given purchased the equity of redemption, but without the concurrence of the mortgagor, made a sale of the lands, it was held that the mortgagee could not recover a deficiency from the mortgagor (*w*).

Where the mortgagee and mortgagor sold and conveyed part of the mortgaged property, without the concurrence of a person to whom subsequently to the mortgage the mortgagor

(*s*) *Beatty v. Bealey*, 1912, 26 O.L.R. 145; *In re Burrell, Burrell v. Smith*, 1869, L.R. 7 Eq. 329. Thus a puisne mortgagee who submits to a foreclosure at the suit of a prior mortgagee is not thereby disabled from recovering on the covenant. *Worthington & Co. v. Abbott*, [1910] 1 Ch. 588.

(*t*) *Kinnaird v. Trollope*, 1888, 39 Ch.D. 636. See chapter 19, *Discharge or Reconveyance*, §182, as to the general right of a mortgagee to a reconveyance on payment.

(*u*) *Mendels v. Gibson*, 1905, 9 O.L.R. 94; *Munsen v. Hauss*, 1875, 22 Gr. 279.

(*v*) *British and Canadian Loan Co. v. Williams*, 1888, 15 O.R. 366; *Palmer v. Hendrie*, 1859, 27 Beav. 349.

had sold the remainder of the property, and whose interest was known to the mortgagee, and the mortgagee covenanted for freedom from encumbrances, it was held that the mortgagee having thereby put it out of his power to reconvey the whole of the mortgaged property could not call on the owner of the remaining portion for payment of the balance of the mortgage money (*ib.*).

Where, however, a mortgagor conveyed part of the mortgaged property to a purchaser, and gave a covenant against encumbrances, and the mortgagee subsequently released the part so sold from his mortgage, it was held that as the release was in accordance with the mortgagor's own obligation as to that part it did not affect the mortgagee's right to recover the mortgage debt or realize his lien on the rest of the mortgaged property.

A mortgagee not only discharged a portion of the mortgaged lands upon part payment, as he was entitled to do under the mortgage, but also assented to a right of way across the whole of the property granted by the then owners of the equity of redemption a portion of it, and released such right of way from his mortgage. It was held that the mortgagee having debared himself from restoring the mortgaged lands in the same manner and quantity, in a manner unauthorized by the terms of the mortgage, an assignee of the mortgage could not claim under the covenant in an administration of the mortgagor's estate, but the claimant was allowed a period of 30 days within which to put himself in a position to sue for the land (*ib.*).

But after the mortgagee has obtained a final order of foreclosure he cannot sue on the covenant.

(a) *Howard v. Garbutt*, 1887, 12 Q.B. 413.

(b) *Crawford v. Armour*, 1887, 12 Q.B. 413.

(c) *In re Threlknot*, 1902, 3 Ch. 118.

provided he is in a position to reconvey the mortgaged property (2).

The relations of the mortgagee, the mortgagor and the purchaser who agrees with the mortgagor to assume the mortgage and covenants with the mortgagee to indemnify the latter are not those of creditor, surety and principal debtor respectively. Therefore if the mortgagee makes a binding agreement to give time to the purchaser or otherwise deals with him without the consent of the mortgagor, the mortgagor is not discharged and he may be sued upon the mortgage, provided that when he is sued the mortgagee is not then disabled from restoring to the mortgagor the unimpaired property or the unimpaired obligation of the purchaser to indemnify the mortgagee (a).

If a mortgagee has made or given a demand or notice either requiring payment of the mortgage money or declaring his intention to exercise the power of sale, no further proceedings and no action with respect to the mortgage may be taken or commenced until the expiration of the time at or after which payment is to be made or the power of sale is to be exercised without an order of a judge (b).

(2) See chapter 24, *Action for Foreclosure or Sale*, §244.

(a) See chapter 14, *Transfer of the Equity of Redemption*, §136.

(b) R.S.O. 1914, c. 112, s. 29, quoted in chapter 31, *Sale under Power of Sale*, §340.

CHAPTER XXIV.

ACTION FOR FORECLOSURE OR SALE.

- §231. The right to foreclosure or sale, p. 388.
- §232. Writ of summons for foreclosure, p. 395.
- §233. Parties in the action, p. 399.
- §234. Original defendants, p. 401.
 - (a) The mortgagor.
 - (b) The owner of the equity of redemption.
 - (c) The lessee of the mortgagor.
 - (d) Personal representatives.
 - (e) The wife or husband of the mortgagor.
 - (f) A surety for the mortgagor.
- §235. Pleadings, p. 415.
- §236. Interlocutory judgment, p. 418.
- §237. General conduct of the reference, p. 425.
- §238. Considering judgment and adding parties, p. 426.
- §239. Taking accounts and appointing day for redemption, p. 432.
- §240. The master's report, p. 439.
- §241. Subsequent accounts and appointment of new day for redemption, p. 442.
- §242. Stay of action on payment of arrears, p. 446.
- §243. Change of state of the account, p. 447.
- §244. Final order of foreclosure, p. 448.
- §245. Action or judgment for sale, p. 455.
- §246. Foreclosure or sale under the Land Titles Acts, p. 466.
- §247. Sale proceedings in the registrar's office, p. 474.
- §248. Foreclosure in the registrar's office, p. 480.

§231. *The right to foreclosure or sale.*

When the Court of Chancery began to entertain applications by mortgagors for leave to redeem notwithstanding that by default in payment they had lost their legal or contractual right to redeem, it was obliged in turn, in order to do complete equity, to entertain applications by mortgagees for foreclosure—the effect of a decree of foreclosure being simply to require a mortgagor within a definite time to redeem under penalty of being finally foreclosed or deprived of his equitable right to redeem (*a*). The correlative and reciprocal remedy to redemption is foreclosure. Equity, which by its interference has prevented the mortgagee from asserting his legal right to absolute ownership under the strict terms of the contract, simply removes the stop it has itself put on, upon default of the mortgagor in discharging the debt after reasonable time given to him, or in other words decrees foreclosure (*b*).

As a general rule upon default in payment of the moneys secured by a mortgage, the mortgagee may bring an action for foreclosure (*c*), whether he has a power of sale or not (*d*), whether he has taken possession or not (*e*), and whether the mortgage is a legal mortgage or is an equitable mortgage under an agreement for a legal mortgage (*f*) or by deposit of title deeds (*g*) or is a mortgage of an equity of redemption (*h*).

(*a*) See chapter 3, *Legal Mortgage in Equity*, §22.

(*b*) *Carter v. Wake*, 1877, 4 Ch.D. 605.

(*c*) *Balfé v. Lord*, 1842, 2 Dr. & W. 480, 18 R.C. 481.

(*d*) *Slade v. Riggs*, 1843, 3 Hare 35; *Wayne v. Hanham*, 1851, 9 Hare 62.

(*e*) *Lord Penrhyn v. Hughes*, 1799, 5 Ves. 99, at p. 106.

(*f*) *Frail v. Ellis*, 1852, 16 Beav. 350.

(*g*) *James v. James*, 1873, L.R. 16 Eq. 153; *York Union Banking Co. v. Artley*, 1879, 11 Ch.D. 205; *Sadler v. Worley*, [1894] 2 Ch. 170, at p. 174; *London County and Westminster Bank v. Tompkins*, [1918] 1 K.B. 515, at p. 529.

(*h*) *Rose v. Page*, 1829, 2 Sim. 471; *Richards v. Cooper*, 1842, 5 Beav. 304.

A mortgagee is usually entitled to foreclosure or sale at his option (*i*), but in some cases he is entitled to sale only. The right of foreclosure arises only if there has been a forfeiture by reason of a breach of condition (*j*), because it is only in that case that there is an equitable right to redeem to be foreclosed.

A mortgagee is not entitled to bring an action for foreclosure unless the mortgage is overdu. (*k*). Default in payment of interest or of an instalment of principal is sufficient (*l*) if such default is in breach of the condition for reconveyance or defeasance, because in that event the mortgagee's estate becomes absolute at law and foreclosure will therefore lie (*m*). A mortgagee may foreclose if an instalment of principal is overdue, even though he has agreed that the final instalment of the principal shall not be payable until the happening of a certain event and that event has not yet happened (*n*), but he is not entitled to foreclose if he has agreed that

(*i*) *York Union Banking Co. v. Artley*, 1879, 11 Ch.D. 205; *Meyers v. Harrison*, 1850, 1 Gr. 449; *Sadler v. Worley*, [1894] 2 Ch. 170, at p. 174; *sed cf. In re Owen*, [1894] 3 Ch. 220, at p. 227; *Backhouse v. Charlton*, 1878, 8 Ch. D. 444.

(*j*) *Bonham v. Newcomb*, 1684, 1 Vern. 232; *Sampson v. Pattison* 1842, 1 Hare 533. As to an action for sale and the jurisdiction of the court to decree sale in a foreclosure action, see below in this chapter, §245. Sale by a mortgagee under his power of sale is discussed in chapter 31.

(*k*) Even if another mortgage on the same land to the same mortgagee is overdue. *Thibodo v. Collar*, 1850 1 Gr. 147.

(*l*) *Stanhope v. Manners*, 1763, 2 Eden 197; *Cameron v. McRae*, *Sparks v. Redhead*, 1852, 3 Gr. 311; *Canada Settlers Loan Co. v. Nicholles*, 1896, 5 B.C.R. 41.

(*m*) *Williams v. Morgan*, [1906] 1 Ch. 804. It was held that the proviso for reconveyance in this case did not import that interest was to be paid half-yearly on the days specified in the covenant for payment, and that there was consequently no breach of condition by reason of the failure to pay the interest and therefore no forfeiture and no right to foreclose.

(*n*) But the mortgagee would not be entitled to a judgment on the covenant in respect of the last mentioned instalment, and the

the whole principal sum shall not be called in before a certain event and that event has not happened (*o*). Where there was a stipulation that in default of payment of any instalment of interest for six months the whole principal should become due, it was held that a suit to foreclose could not be brought until after the six months had expired (*p*).

If the security is a mere charge or lien, and not in the nature of a mortgage or an agreement for a mortgage, the proper remedy is an action for sale to realize the security and not foreclosure (*q*). Thus, sale and not foreclosure is the proper remedy under the informal instruments commonly called "lien notes" which are usually given to secure the price of goods sold and by which the purchaser agrees that the price shall be a charge or lien on his land (*r*). So, if a mortgage is in the form of a trust for sale, the mortgagee is entitled to sale not foreclosure (*s*). A person entitled to the benefit of an equitable charge created by will upon a reversionary interest in land has no remedy by way of foreclosure, but only by way of sale or mortgage of such interest (*t*). In the case of a Welsh mortgage there is no right of foreclosure (*u*).

mortgagor would be entitled to have the foreclosure action stayed on payment of the other instalments and accrued interest and the costs. *Thomson v. Willson*, 1915, 51 Can. S.C.R. 307, 23 D.L.R. 468, varying *Willson v. Thomson*, 1914, 31 O.L.R. 471, 19 D.L.R. 593. As to the mortgagor's right to apply for a stay of the action upon payment of the overdue instalment and interest and costs, see §242, *infra*.

(*o*) *Burrowes v. Molloy*, 1845, 2 Jo. & Lat. 521.

(*p*) *Parker v. Vine Growers' Association*, 1876, 23 Gr. 179.

(*q*) *Tennant v. Trenchard*, 1869, L.R. 4 Ch. 537, at p. 542; *London County and Westminster Bank v. Tompkins*, [1918] 1 K.B. 515, at p. 529; cf. chapter 5, *Equitable Mortgages*, §44.

(*r*) See s. 36 of the Registry Act, R.S.O. 1914, c. 124, referred to in chapter 8, §71.

(*s*) *Paton v. Wilkes*, 1860, 8 Gr. 252; *In re Alison, Johnson v. Mounsey*, 1879, 11 Ch.D. 281, at p. 297, and cases there cited.

(*t*) *In re Owen*, [1894] 3 Ch. 229.

(*u*) See chapter 1, *Introductory*, §2.

A debenture of a limited company, in the usual form of a floating security charging all the property of the company, both present and future, including its uncalled capital, confers upon the registered holder, in the event of the debenture becoming immediately payable in consequence of the winding up of the company, the ordinary mortgagee's remedy by foreclosure against the uncalled capital as well as the other property comprised in the security (v).

Where a deed, absolute in form, is taken as security for a debt, the grantee is not entitled to foreclose, and his only remedy, in the absence of the concurrence of the mortgagor, is to have a sale through the court (w).

In the case of land without the jurisdiction sale will not be ordered, but in some circumstances a decree for foreclosure will be made. The governing principle is that equity acts *in personam* and that the court may therefore give relief against a person who is within the jurisdiction, on the ground of a contract or some equity existing between him and the plaintiff, notwithstanding that the relief relates to land without the jurisdiction (x), provided that the relief given is not inconsistent with the *lex loci rei sitae* (y). Thus, foreclosure may be decreed against a mortgagor who is within the jurisdiction,

(v) *Sadler v. Worley*, [1894] 2 Ch. 170; *In re Continental Oxygen Co., Elias v. The Co.*, [1897] 1 Ch. 511. As to the nature of a floating charge, see chapter 5, *Equitable Mortgages*, §47.

(w) *Hetherington v. Sinclair*, 1915, 34 O.L.R. 61, 23 D.L.R. 630.

(x) *Penn v. Lord Baltimore*, 1750, 1 Ves. Sen. 444, 1 W. & T.L.C. Eq. 800. As examples of cases in which the court will not entertain an action relating to foreign land, see *British South Africa Company v. Companhia de Moçambique*, [1893] A.C. 602 (trespass to foreign land); *Deschamps v. Miller*, [1908] 1 Ch. 856 (action to impeach a trust settlement).

(y) *Ex parte Pollard*, 1840, Mont. & Ch. 239; *Duder v. Amsterdamsch Trustees Kantoor*, [1902] 2 Ch. 132; *Bank of Africa v. Cohen*, [1909] 2 Ch. 129.



in respect of land without the jurisdiction, because the foreclosure operates merely *in personam* by extinguishing the defendant's personal and equitable right to redeem (z), but the court will not order a sale of such land, because it is not able to supervise or deal effectually with the many matters which are the usual and ordinary incidents of a sale (a), nor will it entertain an action directly involving a decision as to title to land without the jurisdiction (b).

The court will not order foreclosure against the Crown. Where the equity of redemption is held by the Crown the mortgagee may be allowed in default of payment to take possession until the Crown shall think proper to redeem (c), or until satisfaction of the debt (d). The court may direct a sale of the mortgaged lands if the Crown consents or does not object (e).

A chartered bank may foreclose a mortgage properly taken by it under the Bank Act, or may exercise the power of sale contained in such mortgage (f). Presumably it may in the

(z) *In re Hawthorne, Graham v. Massey*, 1883, 23 Ch.D. 743; *Toller v. Carteret*, 1705, 2 Vern. 494; *Paget v. Ede*, 1874, L.R. 18 Eq. 118 (as to this case, see also chapter 3, *Legal Mortgage in Equity*, §28). As to an action by the mortgagor for redemption or other relief with regard to land without the jurisdiction, see chapter 25, *Action for Redemption*, §251.

(a) *Strange v. Bedford*, 1887, 15 O.R. 145.

(b) *In re Hawthorne, supra*; *Ross v. Ross*, 1892, 23 O.R. 43.

(c) *Reeve v. Attorney-General*, 1741, 2 Atk. 223; *Dunn v. Attorney-General*, 1864, 10 Gr. 482.

(d) *Hodge v. Attorney-General*, 1839, 3 Y. & C. 342.

(e) *Seton* 5th ed. 1585; cf. *Bartlett v. Rees*, 1871, L.R. 12 Eq. 395; *Holmsted*, Ontario Judicature Act, 4th ed., p. 1030.

(f) *Bank of Upper Canada v. Scott*, 1858, 6 Gr. 451; 3 & 4 G. 5, c. 9, s. 82. As to the power of a bank to take a mortgage by way of additional security for debts contracted to the bank in the course of its business, see 3 & 4 G. 5, c. 9, s. 80, which makes an exception to the general rule of s. 76 by which a bank is prohibited from lending money on the security of a mortgage.

alternative sue for sale like any ordinary mortgagee. If it acquires an absolute title by foreclosure or otherwise, it must sell or dispose of the land within seven years thereafter or within such further period, not exceeding five years, as may be allowed by the treasury board (*g*).

A mortgagee may commence an action for foreclosure the day after the mortgage money is due, and though such a course may be extremely sharp, he is entitled to his costs (*h*). A mortgage contained a power of sale and a covenant that no sale or notice of sale should be made or given nor any means taken to obtain possession of the mortgaged premises until after three months' notice to the mortgagor demanding payment. It was held that such notice was unnecessary before the filing of a bill for foreclosure (*i*).

The mortgagee may agree to forgo the right to foreclose for a stated time, whether it be for a period of years or for the life of the mortgagor or another person (*j*).

The right to foreclose continues until the mortgage is wholly paid off, even though the mortgagor has given notice after default that he will pay off the money due at a certain day. But where the principal and interest have been paid it has been held that an action for foreclosure cannot be brought merely for non-payment of the balance of costs unpaid (*k*).

If a mortgagee has made or given a demand or notice either

(*g*) 3 & 4 G. 5, c. 9, s. 83.

(*h*) *Bennett v. Foreman*, 1868, 15 Gr. 117. Where a mortgage provides that the principal need not be paid for three years "if in the meantime every half-yearly payment of interest shall be punctually paid," the expression "punctually paid" means "paid on the day fixed for payment" and payment nine days after that day is not sufficient. *Leeds and Hanley Theatre of Varieties v. Broadbent*, [1898] 1 Ch. 343.

(*i*) *Lamb v. McCormack*, 1857, 6 Gr. 240.

(*j*) *Burrowes v. Molloy*, 1845, 2 Jo. & Lat. 521.

(*k*) *Drought v. Redford*, 1827, 1 Moll. 572.

requiring payment of the mortgage money or declaring his intention to exercise the power of sale, no further proceedings and no action with respect to the mortgage may be taken or commenced until the expiration of the time at or after which payment is to be made or the power of sale is to be exercised, without an order of a judge (*l*).

A mortgagee may lose his right to either sale or foreclosure by selling or parting with part of the mortgaged property without the concurrence of the transferee of another part of the equity of redemption. A sale of part of the property under the power of sale contained in the mortgage will not, however, affect the mortgagee's right to bring an action for foreclosure or sale of the remaining part (*m*). Where A advanced \$2000 to B, taking two mortgages for \$1000 each on separate properties, and the mortgagee foreclosed one of the mortgages and then parted with the property, it was held that he was not disabled from foreclosing the other mortgage (*n*).

A decree of foreclosure may be refused on the ground of laches or staleness of demand even though the claim is not barred by any statute of limitations. Thus, where after many years' delay the plaintiffs sought foreclosure of an equitable mortgage of an advowson in gross, foreclosure was refused notwithstanding that the Real Property Limitations Act (*o*) did not apply, an advowson in gross not being "land" within the meaning of the term as used in the statute (*p*).

(*l*) R.S.O. 1914, c. 112, s. 29, quoted in chapter 31, *Sale under Power of Sale*, §340.

(*m*) *Gowland v. Garbutt*, 1867, 13 Gr. 578; cf. *Crawford v. Armour*, 1867, 13 Gr. 576; *Munsen v. Hauss*, 1875, 22 Gr. 279. See also chapter 23, *Action on the Covenant*, §228 as to the mortgagee's disabling himself from suing for payment by having put it out of his power to reconvey the property on redemption.

(*n*) *Bald v. Thompson*, 1869, 16 Gr. 177.

(*o*) Cf. s. 5 of the Limitations Act, R.S.O. 1914, c. 75, quoted in chapter 26, *Limitation of Actions*, §270.

(*p*) *Brooks v. Muckleston*, [1909] 2 Ch. 519; cf. *Williams v.*

§232. *Writ of summons for foreclosure.*

After default under a mortgage, the mortgagee might before the Judicature Act have pursued various remedies by action at law or suit in equity concurrently (*q*). He may now combine his claims in one action (*r*). In Ontario it is provided by rule 460, as follows:

460. A mortgagee may in an action claim foreclosure of the equity of redemption or a sale of the mortgaged premises, and payment of the mortgage debt by any party personally liable therefor and possession of the mortgage premises. The writ shall be endorsed in accordance with the form applicable thereto.

In this chapter will be discussed specially the remedy by way of foreclosure or sale which is the main purpose of this combined "mortgage action." Foreclosure or sale was formerly obtained by a suit in equity, and it was chiefly in such suits as well as in suits for redemption that the Court of Chancery gave effect, on equitable terms and by appropriate procedure, to the various equitable principles, explained in earlier chapters, governing the relation of mortgagor and mortgagee both as it existed between the original parties and as it was effected by subsequent transfers of the mortgage or by subsequent mortgages or transfers of the equity of redemption.

In Ontario prior to the Administration of Justice Act of 1873 (*s*), it was not competent for the Court of Chancery to grant a judgment for immediate payment of the mortgage money, though the remedy for enforcement of the charge on the land was to be obtained in that court, and that court had

Thomas, [1909] 1 Ch. 713. As to the doctrine of laches as applied to a claim for redemption of a mortgage, see chapter 25, *Action for Redemption*, §251.

(*q*) See chapter 22, *Action for Possession*, §211.

(*r*) See *Dymond v. Croft*, 1876, 3 Ch.D. 512; *Withall v. Nixon*, 1885, 28 Ch.D. 413; *Farrar v. Lacy, Hartland & Co.*, 1885, 31 Ch.D. 42.

(*s*) 36 V. c. 8; R.S.O. 1877, c. 49. By this statute the jurisdiction of the Court of Chancery and that of the courts of common law were rendered to a considerable extent concurrent.

jurisdiction to order payment by the mortgagor of the residue of the claim which should not be satisfied by the sale of the land (t). The remedy for enforcement of immediate payment was by action at law upon the covenant for payment. In such action interest could be recovered only down to the date of the writ, and a personal order for payment of the subsequent interest could be obtained only by the bringing of a new action. Now, however, the second action is unnecessary because in an action for foreclosure or sale a personal order may be made for payment of the interest found to be due on the taking of the mortgage account, and the court regards as vexatious the taking of a double set of proceedings where one action would have sufficed (u).

The form of endorsement of a writ of summons embodying the claims for foreclosure, payment and possession which under rule 460 may be combined in one action is as follows:

The plaintiff's claim is on a mortgage dated the day
of made between [or by deposit of
title deeds], and that the mortgage may be enforced by foreclosure.
*If immediate payment is desired add, And to recover from you
the defendant, (naming the defendant against whom the relief is
claimed) payment of the amount due under a covenant by [you] in
that behalf contained in said mortgage (or as the case may be).*

(t) *Sawyer v. Robertson*, 1900, 19 O.P.R. 172. The decision was that an action which combined the claims for immediate payment and for enforcement of the charge was not one in which it was irregular to give a jury notice under s. 103 of the Judicature Act, R.S.O. 1897, c. 51, which provided that, subject to rules of court, all causes, matters and issues over the subject of which prior to the Administration of Justice Act of 1873, the Court of Chancery had exclusive jurisdiction, should be tried without a jury, unless otherwise ordered.

(u) *Poulett v. Hill*, [1893] 1 Ch. 277. This was an action for subsequent interest by a mortgagee after having already commenced an action for foreclosure and immediate payment. In *Williams v. Hunt*, [1905] 1 K.B. 512, the mortgagee refrained in the foreclosure action from asking for an order for immediate payment and subsequently brought an action for payment. The second action was stayed because the mortgagee might have asked for and obtained in the first action all the relief to which she was entitled.

If order for immediate possession is desired add). And take notice further that the plaintiff claims to be entitled to recover immediate possession of the mortgaged premises.

And take notice that the plaintiff claims that there is now due by you for principal money the sum of \$ *[If so add and for taxes (or premiums of insurance or other matters) the sum of \$]* and for interest the sum of \$ and that you are liable to be charged with these sums and subsequent interest to be computed at the rate of per centum per annum and costs, in and by the judgment to be drawn up, and that in default of payment thereof within six calendar months from the time of drawing up the judgment your interest in the property may be foreclosed unless before the time allowed you for appearance you file in the office within named a memorandum in writing entitled in this action and signed by yourself or your solicitor to the following effect:—"I dispute the amount claimed by the plaintiff in this action" in which case you will be entitled to four days' notice of the taking of the account of the amount due to the plaintiff.

If you desire a sale of the mortgaged premises instead of a foreclosure, and do not intend to defend the action, you must within the time allowed for appearance, file in the office within named, a memorandum in writing entitled in this action and signed by yourself or your solicitor, to the following effect:—"I desire a sale of the mortgaged premises in the plaintiff's writ of summons mentioned, or a competent part thereof, instead of a foreclosure," and you must deposit in the court to the credit of this action the sum of \$80 to meet the expenses of such sale and attach to the said memorandum a certificate of the Accountant of the Supreme Court to the effect that such deposit of \$80 has been made.

"The following is a description of the mortgaged premises:" (*Set out description sufficient for registration*).

The endorsement on the writ should contain a description of the mortgaged lands. But where the plaintiff by mistake omitted from the description of the lands in the writ of summons a parcel included in the mortgage, an order was made, after judgment and final order of foreclosure, vacating the final order and directing an amendment of the writ and all the proceedings (*v*).

If a plaintiff seeks delivery of possession it is important that the claim should be contained in the endorsement on the

writ of summons or in the statement of claim, and that an order for possession should be inserted in the judgment (*v*).

In Ontario a writ of summons in an action for foreclosure or sale may be "specially endorsed" (*x*) so as to entitle the plaintiff to take advantage of rules 56 and 57. Under rule 56, where the writ is specially endorsed, the defendant must with his appearance file an affidavit that he has a good defence upon the merits and shewing the nature of his defence, with the facts and circumstances which he deems entitle him to defend the action (*y*), and under rule 57 the plaintiff may thereupon cross-examine upon such affidavit and move for judgment (*z*), and if the court is satisfied that the defendant has not a good defence to the action on the merits, or has not disclosed such facts as may be deemed sufficient to entitle him to defend the action, judgment may be given for the plaintiff.

(*v*) See *Wills v. Luff*, 1888, 38 Ch.D. 197. As to enlarging the claim contained in the endorsement on the writ of summons by claiming possession, see §235, *infra*.

(*x*) That is to say, the plaintiff who claims all or any of the remedies authorized by rule 460 and uses the form of endorsement above quoted, may also use a special form of writ which requires the defendant, within the time allowed for appearance, to file and serve an affidavit showing the nature of his defence, and contains a "warning" that in default of the filing and service of such affidavit judgment will be entered and execution issued. Under the former rules it had been held that if a mortgagee "specially endorsed" his writ with a claim for foreclosure and for immediate delivery of possession, and for immediate payment he was not entitled to move for summary judgment for the recovery of possession, although if he had claimed merely possession or payment or both he might have moved for summary judgment. *Independent Order of Foresters v. Pegg*, 1900, 19 O.P.R. 80. Cf. *Central Trust Co. v. Algoma Steel Co.*, 1903, 6 O.L.R. 464. Rule 33 now expressly provides for the special endorsement of a writ of summons in actions for foreclosure or sale. If a writ is specially endorsed the specific claim should be followed by the words, "and the plaintiff further claims \$ for costs."

(*y*) An affidavit is not necessary where an appearance is entered by the official guardian for an infant or lunatic.

(*z*) The plaintiff need not file an affidavit on the motion, and he

§233. *Plaintiffs in the action.*

If there are two or more mortgagees they must both or all be parties to the action, whether they be joint tenants or tenants in common of the lands conveyed by the mortgage, and therefore one of the mortgagees may bring a foreclosure action and make his co-mortgagees defendants, if they will not join as plaintiffs (*a*). Where several persons have advanced mortgage moneys in distinct shares, one of such persons cannot maintain an action for foreclosure of a proportionate part of the estate (*b*). In such a case one of the mortgagees may bring an action to foreclose the mortgage making his co-mortgagees defendants, and is entitled to judgment for foreclosure on default in payment of the whole mortgage debt in the proportions due to the several mortgagees separately (*c*).

If a mortgage is vested in two persons jointly as trustees or otherwise, the survivor may maintain an action for foreclosure without joining as parties the personal representatives of the deceased mortgagee if the latter had no beneficial interest in the mortgage (*d*).

In Ontario under the Devolution of Estates Act the real and personal property of a deceased person devolves upon and becomes vested in his personal representatives, but in the case of real property not disposed of, conveyed to or distributed

may move without cross-examining. The fate of the motion depends upon the defendant's depositions. *Langdon-Davies Motors Canada v. Gasoletric Motors*, 1914, 32 O.L.R. 84.

(*a*) *Luke v. South Kensington Hotel Company*, 1879, 11 Ch.D. 121; *In re Continental Oxygen Co., Elias v. The Company*, [1897] 1 Ch. 511.

(*b*) *Palmer v. The Earl of Carlisle*, 1823, 1 Sim. & St. 423, 18 R.C. 491.

(*c*) *Davenport v. James*, 1847, 7 Hare 249.

(*d*) *Landale v. McLaren*, 1892, 8 M.R. 322; *Plenderleith v. Smith*, 1905, 10 O.L.R. 188; see s. 4 of the Mercantile Law Amendment Act, quoted in chapter 13, *Persons entitled on Death of the Mortgagee*, §124.

among the persons beneficially entitled within three years, it becomes vested in the latter, subject to the registration by the personal representatives of a caution or of successive cautions. The statute also contains a special provision as to the powers of the personal representative of a deceased person who was entitled to any freehold land by way of mortgage (e).

It is further provided by rule 74, as follows:

74.—(1) Trustees, executors, and administrators may sue and be sued on behalf of, or as representing, the property or estate of which they are trustees or representatives, without joining any of the persons beneficially interested, and shall represent them; but the court may at any time order any of them to be made parties in addition to, or in lieu of, the previous parties.

(2) This rule shall apply to an action to enforce a security by foreclosure or otherwise.

In a suit brought by executors of a mortgagee to foreclose it was held that the heirs of the deceased mortgagee or the persons beneficially entitled under his will were not necessary parties (f).

Where a mortgage is vested in trustees the *cestui que trust* or one of the *cestuis que trust* may bring action for foreclosure of the entire mortgaged estate. But the trustees must be made parties to such an action (g).

Where a mortgage is taken in the name of one partner to secure a partnership debt and a bill is filed by him to enforce the security, the representatives of a deceased partner are not necessary parties (h).

The Married Women's Property Act (i) enacts that every woman whether married before or after the act shall have in

(e) For a fuller statement of these provisions, see chapter 13, *Persons entitled on Death of the Mortgagee*, §123.

(f) *Lawrence v. Humphries*, 1865, 11 Gr. 209.

(g) *Wood v. Williams*, 1819, 4 Madd. 186, 20 R.R. 291.

(h) *Stephens v. Simpson*, 1866, 12 Gr. 493.

(i) R.S.O. 1914, c. 149, s. 16.

her own name against all persons whomsoever, including her husband, the same remedies for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*. When, therefore, a married woman advances on mortgage moneys which are her separate property, it is no longer necessary that she should sue for foreclosure or sale by a next friend, or that she should give security for costs (j).

The assignee of the mortgagee's estate in the land may sue for foreclosure or sale, but to enable him to sue upon the covenant an assignment of the mortgage debt is necessary (k).

If a sheriff seizes a mortgage under a writ of execution against the lands of the mortgagee, he may bring an action for foreclosure or sale (l).

§234. *Original defendants.*

As already pointed out any persons partially or jointly interested in the mortgage security who are not plaintiffs in an action for foreclosure must be made defendants.

All persons who are interested in the ultimate equity of redemption must be made defendants, but while it is the ordinary rule of practice that parties to an action should be joined at its inception and that after judgment parties cannot be added (m), some exceptions are made in the case of an action for foreclosure or sale. In the first place, persons having any liens, charges or encumbrances (n) upon the mortgaged property subsequent to the plaintiff's mortgage should not be made parties by the writ of summons but should be added in the

(j) *Threlfall v. Wilson*, 1883, 8 P.D. 18.

(k) See chapter 11, *Assignee of the Mortgagee*, §§101 and 102.

(l) See chapter 12, *Execution Creditors of the Mortgagee*, §112; R.S.O. 1914, c. 80, s. 27.

(m) *Johnston v. Consumers Gas Co.*, 1896, 17 O.P.R. 297.

(n) Including subsequent mortgagees, execution creditors and mechanics lienholders.

master's office pursuant to the judgment in the action (*o*). In the second place it is provided in Ontario by rule 490 as follows:

490. (1) Where one or more of the persons interested in the equity of redemption are already defendants, and it is made to appear that by reason of their number or otherwise, it is expedient to permit the action to proceed without the presence of the other persons interested in the equity of redemption, the court may give directions accordingly, and may order such other persons to be made parties in the master's office after judgment.

(2) Where after judgment it appears that persons are interested in the equity of redemption besides those who are already parties, such persons may be made parties in the master's office upon such terms as may seem just.

Under the first clause of the rule either an interlocutory order may be made or a special provision may be inserted in the judgment, but such provision should not be inserted in a judgment obtained on *præcipe* (*p*).

Upon a motion to add parties in the master's office notice should be given to the parties already before the court, but it is not necessary to notify the persons whom it is intended to add as parties (*q*). The application must be made before final order of foreclosure or sale (*r*).

Notwithstanding this rule the court will require the plaintiff to frame his action with diligence and to bring the proper parties before the court in the first instance (*s*).

(*o*) *Jackson v. Hammond*, 1879, 8 O.P.R. 157; *Nelson v. Cochran*, 1889, 13 O.P.R. 76; see §238, *infra*.

(*p*) See further notes to this rule in *Holmsted*, Ontario Judicature Act, 4th ed., 1084 ff.

(*q*) *Penner v. Canniff*, 1868, 1 Chy. Ch. Ont. 351; *Rumble v. Moore*, 1868, 1 Chy. Ch. 59; *Harrison v. Grier*, 1869, 2 Chy. Ch. 440. In *Cummins v. Harrison*, 1868, 1 Chy. Ch. 369 the order was granted *ex parte*.

(*r*) *Municipality of Orford v. Bayley*, 1868, 1 Chy. Ch. 272; *Street v. Dolan*, 1871, 3 Chy. Ch. 227.

(*s*) *Paterson v. Holland*, 1860, 8 Gr. 238; *Buckley v. Wilson*, 1861, 8 Gr. 566.

"If parties will not take the trouble (more or less according to circumstances) to bring the proper parties before the court, they have only themselves to blame, but they have no right to cast that labour upon the court and turn it into a court of inquiry for their convenience." (t)

Everyone whose interests may be affected by the accounts to be taken in the action must be brought before the court either as plaintiff or as defendant. In an action for foreclosure or sale the interests of a mortgagee who has priority over the plaintiff cannot be affected by the accounts taken in the action, since the amount found to be due will be a charge on the property only subject to the claim of the prior mortgagee. A prior mortgagee therefore is not a necessary party to an action for foreclosure or sale (u). On the other hand in a redemption action (v) all subsequent mortgagees and the owner of the ultimate equity of redemption must be joined as defendants for the purpose of foreclosing them. Hence the maxim, *you may foreclose without redeeming, but you cannot redeem without foreclosing*. When a person seeks to redeem he joins all mortgagees up to the mortgagee whom he seeks to redeem parties and offers to redeem them; he also joins as parties all the mortgagees subsequent to him and the owner of the ultimate equity of redemption and asks for the foreclosure of them. If the action is for foreclosure of sale, the plaintiff need not join prior mortgagees. He need join as parties only those persons whom he seeks to foreclose (w).

Accordingly a person who has a title paramount to the mortgage in respect of which foreclosure or sale is sought should not ordinarily be made a party at all and will not be affected by the proceedings. The ordinary remedy of the subsequent mortgagee against a prior mortgagee is merely to

(t) *Portman v. Paul*, 1864, 10 Gr. 458.

(u) *Crawford v. Meldrum*, 1872, 19 Gr. 165.

(v) See chapter 25, *Action for Redemption*, §257.

(w) *Strahan, Law of Mortgages*, 2nd ed., pp. 157-158.

redeem the prior mortgage. If, however, any relief is sought against any persons (other than subsequent encumbrancers whom it is sought to foreclose) they must be made parties by writ and they cannot be made parties in the master's office (*x*), unless the case comes within rule 490 already mentioned.

So if the prior security was created by a deed absolute in form, a subsequent mortgagee is at liberty to make the prior mortgagee a party to his foreclosure action for the purpose of obtaining a declaration that the deed is really a mortgage and therefore redeemable, although he does not offer to redeem but merely seeks to foreclose or sell subject to the mortgage (*y*). The execution creditors of the alleged mortgagee are necessary parties to such an action (*z*).

So where the plaintiff claimed that an execution against the mortgagor which was prior in time to the plaintiff's mortgage should be postponed, it was held that the execution creditor must be made a defendant by writ and could not be added in the master's office, but the plaintiff was allowed to have his judgment set aside, add the execution creditor as a party, and amend so as to raise the question of priority (*a*).

A railway company took possession of certain lands and proceeded with an arbitration with the owners as to their value. The lands were subject to a mortgage to the plaintiffs, who received no notice of and took no part in the arbitration proceedings, and gave no consent to the taking of possession. An award was made but was not taken up by the railway company or the owners. In an action by the plaintiffs against the

(*x*) *Hopper v. Harrison*, 1880, 28 Gr. 22; *Reinhart v. Shutt*, 1888, 15 O.R. 325.

(*y*) *Moore v. Hobson*, 1868, 14 Gr. 703; *Rogers v. Lewis*, 1866, 12 Gr. 257.

(*z*) *Glass v. Freckleton*, 1864, 10 Gr. 470; *Darling v. Wilson*, 1869, 16 Gr. 255.

(*a*) *Lally v. Longhurst*, 1888, 12 O.P.R. 510, following *Glass v. Freckleton*, 1864, 10 Gr. 470.

owners and the railway company for foreclosure it was held that the latter was a proper party (b).

If the mortgagee seeks to obtain possession from a person who is in possession of the mortgaged land (not being a tenant under a lease made by the mortgagor subsequent to the mortgage without the mortgagor's consent (c)), such person in possession would be a proper party to an action for foreclosure or sale.

With the exceptions already noted, all persons who have any interest in the ultimate (d) equity of redemption must be made defendants by writ, and they are necessary parties in this sense, that if the mortgagee (who presumably desires to acquire an absolute title free from any equity of redemption whatsoever) omits to make defendants any persons interested in the equity of redemption such persons will not be affected by the proceedings and to that extent the foreclosure will be inoperative. The persons interested in the equity of redemption may be classified as follows:

(a) *The mortgagor, if he still retains any interest in the equity of redemption.*

If a mortgagor absolutely assigns the equity of redemption he thereby loses his right to redeem; and in that case he is not a necessary party to an action for foreclosure or sale. But it is usual and advisable to make the mortgagor a party, although he may have disposed of the equity of redemption. If

(b) *Scottish American Investment Co. v. Prittie*, 1893, 20 O.A.R. 398.

(c) A tenant in the circumstances mentioned would be a necessary party, being a partial owner of the equity of redemption. See below.

(d) As pointed out in chapter 14, *Transferee of the Equity of Redemption*, §131, a mortgagor who makes a second mortgage no longer has any equity of redemption in the first mortgage. He is however interested in the ultimate equity of redemption.

any question as to the validity of the mortgage should arise in the action it would be necessary for the proper disposition of such question that the mortgagor should be before the court. The Ontario rules of practice and the forms provided by the rules for mortgage proceedings contemplate making the mortgagor a defendant for the purpose of enforcing against him the claim on the covenant to pay the mortgage debt (*e*).

If a mortgagor has assigned his equity of redemption and the mortgagee makes him a party for the purpose of recovering on the covenant to pay the mortgage debt, the mortgagor's right to redeem revives (*f*).

In England a bankrupt mortgagor is not a necessary or proper party to an action for foreclosure even although the trustee in bankruptcy disclaims all interest in the equity of redemption (*g*); for during his bankruptcy the mortgagor has no estate or interest in the mortgaged property even although the trustee disclaims (*h*). In Ontario an assignment for the benefit of creditors under the Assignments and Preferences Act (*i*) vests in the assignee any equity of redemption belonging at the time of the assignment to the assignor. As, however, the personal liability of the mortgagor for the mortgage debt continues notwithstanding the assignment for the benefit of creditors, the mortgagor is a proper party if payment of the mortgage debt is sought against him. The assignment does not differ in this respect from any other transfer by the mortgagor of his equity of redemption.

(*e*) See, e.g., rule 460 and form of endorsement on the writ of summons in §232, *supra*.

(*f*) *Kinnaird v. Trollope*, 1888, 39 Ch.D. 636.

(*g*) *Lloyd v. Lander*, 1821, 5 Madd. 282; *Pannell v. Hurley*, 1845, 2 Coll. 211; *Kerrick v. Saffery*, 1853, 7 Sim. 317; *Collins v. Shirley*, 1839, 1 R. & My. 638.

(*h*) *In re Mercer and Moore*, 1880, 14 Ch.D. 287.

(*i*) R.S.O. 1914, c. 134, s. 9.

Where a derivative mortgagee brings an action to foreclose the original mortgage, the original mortgagee or his personal representatives must be made parties as having a right to redeem the sub-mortgage. But if the original mortgagee's interest is wholly gone he is not a necessary party (*j*). And if the action relates only to the derivative mortgage the original mortgagor is not a necessary party (*k*).

(b) *The present owner of the equity of redemption by assignment from the mortgagor or from his transferee.*

Where the mortgaged lands have been sold to several persons, the purchasers, however numerous, must be made parties to the action. The mortgagee is entitled to insist that the whole of the mortgaged estate shall be redeemed together (*l*). Where a company purchased land subject to a mortgage and subsequently issued debentures charging the property, it was held that all the debenture holders must be made parties to the action (*m*).

It is not necessary or proper for the plaintiff in a foreclosure action to join as defendant the intermediate owner of the equity of redemption, that is to say, a person who at one time owned the equity of redemption but who has conveyed it away prior to the action (*n*).

(j) *Hobart v. Abbot*, 1731, 2 P. Wms. 643.

(k) *In re Burrell*, *Burrell v. Smith*, 1869, L.R. 7 Eq. 399; *Silverthorn v. Glazebrook*, 1899, 30 O.R. 408.

(l) *Peto v. Hammond*, 1860, 29 Beav. 91; *Buckley v. Wilson*, 1861, 8 Gr. 566.

(m) *Griffith v. Pound*, 1890, 45 Ch.D. 553.

(n) *Walker v. Dickson*, 1892, 20 O.A.R. 96. The object of adding the intermediate purchaser in this case was to obtain a judgment declaring such purchaser liable personally to pay the mortgage debt by reason of his alleged obligation to indemnify the person from whom he had purchased. As to such obligation, see chapter 14, *Transferee of the Equity of Redemption*, §134.

(c) *The lessee of the mortgagor.*

If the owner of land after making the mortgage leases the land without the authority of the mortgagee, the lease is subject to the mortgage. The lessee is a purchaser of the equity of redemption *pro tanto* and is entitled to redeem. He is therefore a necessary party to an action for foreclosure or sale (o). It has been held that even after final order of foreclosure a tenant for years who was not made a defendant might open up the foreclosure and redeem, unless the mortgagee would confirm his tenancy (p).

It is necessary to make the tenant a party no matter how long or how short his term may be, if the mortgagee desires to affect him by the proceedings and to compel him to give up possession of the mortgaged lands. It is not unusual, however, for the mortgagee to refrain from making the tenant a party and to assume the risk as to getting possession and as to the possibility of the tenant's subsequently desiring to redeem—a remote possibility unless the lease is a valuable one.

If the lease was made prior to the mortgage or subsequent to the mortgage with the mortgagee's authority, the lessee's interest is paramount to the mortgage and the lessee will not be a proper or necessary party unless the mortgagee seeks some relief against him (q).

(o) *Tarn v. Turner*, 1888, 39 Ch D. 456.

(p) *Martin v. Miles*, 1883, 5 O.R. 404. A tenant, like any other partial owner of the equity, who redeems would take the land subject to the claims of the other persons interested in the equity of redemption. See chapter 25, *Action for Redemption*, §256.

(q) For instance if the mortgagee claimed priority over the lease under the provisions of the Registry Act, R.S.O. 1914, c. 124, s. 71 (2); see chapter 8, §72. As to the right of the mortgagee to demand payment of the rent by the prior lessee, see chapter 15, *Lessee of Mortgaged Land*, §142.

(d) *The personal representatives of a deceased mortgagor or owner of the equity of redemption who if alive would have been a necessary party.*

In Ontario under the Devolution of Estates Act the real and personal property of a deceased person devolves upon and becomes vested in his personal representative, but in the case of real property not disposed of, conveyed to or distributed among the persons beneficially entitled within three years, the estate or interest of the deceased person becomes thereafter vested in the persons beneficially entitled, subject to the registration by the personal representatives of a caution or successive cautions (r). By virtue of the statute and of rule 74 (s), so long as the interest of the deceased person is vested in his personal representatives, an action for foreclosure or sale is properly constituted if it is brought against the personal representatives, and the persons beneficially interested are not generally necessary or proper parties (t), but under rule 74 the court may at any time order any of the beneficiaries to be made parties in addition to, or in lieu of, previous parties.

Before the passing of the Devolution of Estates Act, upon a mortgagor dying intestate, proceedings to foreclose must have been against the heirs at law, and if any of them were infants the invariable custom of the court was to determine whether foreclosure or sale would be more for the benefit of the infant. Since the passing of the statute a mortgage action may be maintained against the administrator, and if the heirs are adult the administrator sufficiently represents the heirs

(r) For fuller statement of these provisions, see chapter 13, *Persons entitled on Death of the Mortgagee*, §123; cf. chapter 17, *Persons entitled on Death of the Mortgagor*, §162.

(s) This rule is quoted in §233, *supra*.

(t) *Plenderleith v. Smith*, 1905, 10 O.L.R. 188. In this case the mortgagor had died before the 4th day of May, 1891, so that the provision of the statute with regard to the vesting of the estate in the persons beneficially entitled was not applicable.

by virtue of rule 74, but it has been held that if there are infant heirs, they are proper parties to an action for foreclosure or sale and should be made defendants in the first instance. It may be that the record is complete as a matter of title with the general administrator as sole defendant, but the statute was not intended to derogate from the rights of infant beneficiaries and as a matter of procedure they should be made parties (*u*). Where, however, the mortgagor devised and bequeathed all his real and personal estate to his executors in trust, the latter were held to be the only necessary defendants to an action for foreclosure, although the widow and infant children of the deceased mortgagor were in actual possession of the mortgaged lands (*v*).

A mortgagor having died intestate leaving a husband and infant children and the mortgagee having brought an action against them for foreclosure before the lapse of twelve months (*w*), it was held that the plaintiff was entitled after the lapse of the period to a judgment for foreclosure without having a personal representative of the mortgagor before the court, no administrator having been appointed and no caution having been registered under the statute (*x*).

It is now provided by the Devolution of Estates Act (*y*) as follows:

10.—(1) Where there is no legal personal representative of a deceased mortgagor of freehold property it shall be sufficient for the purposes of an action for the foreclosure of the equity of redemption in, or for the sale of, such property that the person beneficially entitled under the last will and testament, if any, of the deceased mort-

(*v*) *Keen v. Codd*, 1891, 14 O.P.R. 182.

(*w*) *Emerson v. Humphries*, 1892, 15 O.P.R. 84.

(*x*) Under the Devolution of Estates Act as it then stood, real property not disposed of, etc., became vested in the persons beneficially entitled after the lapse of twelve months, subject to the registration of a caution or cautions. The period was in 1902 extended to three years.

(*y*) *Ramus v. Dow*, 1893, 15 O.P.R. 219.

gagor, or under the provisions of this Act, to such property or the proceeds thereof be made defendant to such action, and it shall not be necessary that a legal personal representative of the deceased mortgagor be appointed or be made a defendant thereto unless it shall be otherwise ordered by the Court in which the action is brought or by a Judge thereof; but if during the pendency of such action, the equity of redemption devolves upon and becomes vested in a legal personal representative of the mortgagor he shall be made a party to the action.

(2) In subsection 1 the word "mortgagor" shall include the assignee of a mortgagor and any person entitled to or interested in the equity of redemption.

An action for foreclosure was begun in 1898, and the usual judgment was entered on the 30th of January, 1899. One of the mortgagors defendants died on the 20th of June, 1899, an infant, unmarried and intestate. On the 2nd of May, 1900, a final order of foreclosure was granted, no notice being taken of the infant's death, and he and not his personal representatives or those claiming under him being declared to be foreclosed. It was held that the final order was irregular and was not binding on the infant's mother who was not a party to the action, and in whom an undivided interest in her son's estate became vested at the expiration of a year from his death, and that she was entitled to redeem and to be added as a defendant, upon her own application. An order was made adding her as a defendant, and directing that the action be carried on between the plaintiff and the continuing defendants and new defendant, and that it should stand in the same plight and condition in which it was at the time of the infant's death. The effect was to require a new account to be taken and a new day to be fixed for redemption, of which all the defendants were entitled to avail themselves (2).

(1) R.S.O. 1914, c. 119, s. 10. The original amendment passed in 1906 did not in terms apply to an action for sale, but the statute was changed in this respect by 10 E. 7, c. 56, s. 10.

(2) Kennedy v. Foxwell, 1906, 11 O.L.R. 389.

A trustee will not sufficiently represent the *cestuis que trust* as defendant in a foreclosure action unless he has funds in hand sufficient to enable him to redeem; for all persons must be brought before the court who are interested in the equity of redemption and who may be able and willing to redeem (*a*). If a trustee becomes bankrupt he cannot properly represent his beneficiaries in a foreclosure action, and the beneficiaries should be made parties (*b*), but if a trustee unnecessarily makes the *cestuis que trust* parties he may be ordered to pay their costs (*c*).

(*e*) *The wife or the husband of the mortgagor.*

In Ontario prior to the 11th March, 1879, a widow had no claim to dower in an equity of redemption unless her husband died beneficially entitled (*d*), and she was not a necessary or proper party to an action for foreclosure or sale, whether the land was already subject to mortgage when her husband acquired it or whether she had joined to bar her dower in a mortgage executed by him (*e*).

Since that date a widow is not entitled to dower in an equity of redemption acquired by her husband and disposed of by him in his lifetime, and she is therefore not a proper or necessary party to an action for foreclosure or sale (*f*). If however her husband acquires the legal estate and she joins to bar dower in a mortgage executed by him since that date, she is

(*a*) *Goldsmid v. Stonehewer*, 1852, 9 Hare, App. xxxviii; *Mills v. Jennings*, 1880, 13 Ch.D. 629, 6 App. Cas. 698.

(*b*) *Francis v. Harrison*, 1889, 43 Ch.D. 183.

(*c*) *In re Cooper*, *Cooper v. Vesey*, 1882, 20 Ch.D. 611, C.A.

(*d*) See chapter 18, *Dower and Curtesy in Mortgaged Land*, §172. Prior to 1834 a widow had no claim to dower in an equity of redemption even if her husband died beneficially entitled.

(*e*) *Moffatt v. Thomson*, 1851, 3 Gr. 111; *Davidson v. Boyes*, 1873, 6 O.P.R. 27.

(*f*) *Parker v. Willett*, 1889, 22 N.S.R. 83.

entitled to dower in the equity of redemption, and he cannot transfer the equity of redemption free from dower (*g*). Unless and until her husband dies entitled to the equity of redemption, she has, however, merely an inchoate right to dower, and, strictly speaking, she is not a necessary party to an action for foreclosure or sale, if the proceedings are brought to a conclusion in her husband's lifetime (*h*). But it has been held that where a wife applies after judgment and report and before final order of foreclosure she is entitled to be added as a party and to redeem (*i*). The bar of dower affects the right to dower only so far as is necessary for the protection of the mortgagee, and to the extent that the value of the land represents a surplus over and above the mortgagee's claim, the wife's claim to dower attaches (*j*). In the case of a sale the amount of the surplus, if any, is definitely ascertained, but in the case of foreclosure simply the existence or amount of the surplus cannot be ascertained. It has therefore been held that proper practice requires that she should be a party to an action for foreclosure in order that she may either redeem or protect her interests by asking for a sale; if she does neither there would be no question as to her dower being effectually extinguished (*k*). In view of the uncertain result of the decisions it is safer to make her a defendant (*l*).

(*g*) See chapter 18, §173.

(*h*) *Casner v. Haight*, 1884, 6 O.R. 451. In this case the wife brought an action for redemption after the final order of foreclosure against her husband, and on demurrer it was held that she was not a necessary party to the foreclosure action and was not entitled to redeem.

(*i*) *Blong v. Fitzgerald*, 1893, 15 O.P.R. 467.

(*j*) The amount of dower in the surplus is calculated upon the whole value of the land. See chapter 18, §174.

(*k*) *Ayerst v. McClean*, 1890, 14 O.P.R. 15.

(*l*) *Holmsted*, Ontario Judicature Act, 4th ed., 1086; *Standard Realty Co. v. Nicholson*, 1911, 24 O.L.R. 46, at p. 51.

During the existence of a mortgage in which the mortgagor's wife has joined to bar dower, the wife's sole remedy is to redeem the mortgage, and she is not entitled to assert any claim for dower against the holder of the mortgage (*m*).

When the mortgagor assigns his equity of redemption the wife of the person to whom the assignment is made is not a proper party to an action by the mortgagee for foreclosure (*n*), but it would seem that if the owner of the equity of redemption should die after judgment but before final order of foreclosure, his wife would have a right to redeem. In that case she is a proper party to the action and a new day should be named to allow her to redeem (*o*).

It has been held that if a married woman is entitled to an equity of redemption in land, there is such seisin in her as will entitle her husband to a tenancy by the curtesy upon her death (*p*), provided the other requisites for such tenancy exist (*q*). A married woman may, however, defeat her husband's estate by the curtesy by conveyance *inter vivos* or by her will (*r*), and therefore it would seem that her husband is not a necessary party to an action for foreclosure or sale of land mortgaged by her if the proceedings are brought to a conclusion so as to extinguish the equity of redemption in her lifetime.

(*f*) *A surety for the mortgagor.*

A mere surety by covenant who has paid nothing is not a necessary party to an action for foreclosure, but a surety who

(*m*) *Thompson v. Thompson*, 1904, 37 N.S.R. 242.

(*n*) *Monk v. Benjamin*, 1890, 13 O.P.R. 356.

(*o*) *Monk v. Benjamin*, *supra*.

(*p*) *Casborne v. Scarfe*, 1737, 1 Atk. 603, 2 W. & T. L.C. Eq. 6. As to the dictum in this case that an equity of redemption is an estate in the land, see chapter 3, *Legal Mortgage in Equity*, §28.

(*q*) See chapter 18, *Dower and Curtesy in Mortgaged Land*, §176.

(*r*) See the statutes quoted in §176, *supra*.

has joined as co-mortgagor with the principal debtor is a necessary party (*s*). A wife who joins as co-mortgagor, and not merely to bar dower, in a mortgage by her husband for a debt of his, is a surety and entitled to redeem (*t*).

Where there is a surety for the payment of the mortgage debt in default of payment by the mortgagor, it is desirable to join the surety as a defendant in the action against the mortgagor, because when judgment is recovered against the principal the right of action on the covenant is merged in the judgment and subsequent accruing interest may not be otherwise recoverable against the surety (*u*).

Where a surety by the terms of his agreement has become liable for the deficiency on a mortgage, the mortgagee cannot require him to pay until the security has been realized and the deficiency ascertained (*v*).

§235. *Pleadings.*

Usually in an action for foreclosure or sale there is no dispute as to the validity of the mortgage or as to any other matter which will necessitate the delivery of pleadings, and when the parties have been served, and appearance has been entered or the time for appearance has expired, a judgment will be entered on *præcipe* or on motion with or without a reference as the case may be.

It is unnecessary here to discuss the general rules of pleading. If there are controverted questions arising between the parties, other than mere matters of accounting, the issues will

(*s*) *Gee v. Liddell*, [1913] 2 Ch. 62, at p. 73.

(*t*) *Standard Realty Co. v. Nicholson*, 1911, 24 O.L.R. 46, at p. 52.

(*u*) *Faber v. Earl of Lathom*, 1897, 77 L.T. 168. It was held in Manitoba that a surety for payment of a mortgage is not a proper party to a foreclosure suit and that no personal order can be made against him: *Real Estate Loan Co. v. Molesworth*, 1886, 3 M.R. 116.

(*v*) *Teeter v. St. John*, 1863, 10 Gr. 85.

have to be defined by pleadings or otherwise and the action will have to be tried according to the ordinary rules of practice. Judgment will then be entered according to the result of the trial. If the decision is in favour of the mortgagee, the action may then proceed according to the usual practice in mortgage actions as hereinafter outlined. Only some matters of pleading need be mentioned here which are of special interest in mortgage actions.

It is provided in Ontario by rule 109, as follows:

109.— (1) The plaintiff shall state the nature of his claim and the relief sought in a pleading to be called the statement of claim, and may therein alter, modify, or extend his claim as endorsed upon the writ.

(2) When a defendant has not appeared and the statement of claim alters, modifies, or extends the relief claimed, the plaintiff shall not be entitled to judgment on default of defence unless the statement of claim is served personally or in pursuance of an order for substitutional service.

The plaintiff will not be entitled to any relief in the action which he has not claimed in the writ of summons or in the statement of claim. Thus where a mortgagee by the writ of summons asked for foreclosure, and by his statement of claim asked for an account, payment of the amount found due and, in default of payment, foreclosure or sale and possession, it was held that he was not entitled to judgment for immediate possession, even though the defendant had not entered an appearance to the writ, and did not deliver a statement of defence or appear on the motion for judgment (*w*).

Under the first paragraph of rule 109 the plaintiff may alter, modify or extend his claim in the statement of claim, as, for instance, by adding a claim for possession to the claim for an injunction to restrain waste contained in the writ of summons (*x*), but, in accordance with the principle now ex-

(*w*) *Faithfull v. Woodley*, 1889, 43 Ch.D. 287.

(*x*) *Smythe v. Martin*, 1898, 18 O.P.R. 227.

previously stated in the second paragraph of the rule, it has been held that if the plaintiff endorses the writ with a claim for an account, foreclosure or sale and the appointment of a receiver, and the defendant does not appear, the plaintiff does not become entitled to an immediate judgment for personal payment by claiming this additional relief in the statement of claim duly filed but not served on the defendant (y).

It is further provided by rule 143 as follows:

143. A defendant to an action or counter-claim shall raise all matters which show the action or counter-claim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as for instance, fraud, Statute of Limitations, release, payment, performance, facts showing illegality either by statute or common law, or Statute of Frauds.

Questions such as the invalidity of the mortgage deed should be raised by the pleadings and adjudicated upon by the court on the hearing of the cause. Contentions of this kind cannot be raised in the master's office (z).

Under the English practice the mortgagor should plead in his statement of defence any special matter affecting the account between himself and the mortgagee and should raise the matter at the trial, otherwise such special circumstances cannot afterwards be raised on taking the account (a).

If a mortgagor relies upon the defence that the mortgagee's right of action has been barred by the Statute of Limitations,

(y) *Gee v. Bell*, 1887, 35 Ch.D. 160.

(z) *Bickford v. Grand Junction Railway Co.*, 1877, 1 Can. S.C.R. 696 at p. 725. See *McDougall v. Lindsay Paper Mill Co.*, 1884, 10 O.P.R. 247; *Wiley v. Ledyard*, 1883, 10 O.P.R. 182; *Rowland v. Burwell*, 1888, 12 O.P.R. 607.

(a) *Sanguinetti v. Stuckey's Banking Co.*, [1896] 1 Ch. 502. In Ontario, see rule 410, quoted in chapter 27, *Accounting between Mortgagor and Mortgagee*.

such defence must be expressly pleaded (*b*), but it is unnecessary to plead the Statute of Limitations in order to prevent the recovery of more than six years' arrears of interest in taking the accounts in the master's office; the filing of a disputing notice is sufficient (*c*).

Where the plaintiff company took a mortgage from a trustee and registered it without notice of any equitable right of the *cestui que trust*, the court considered it doubtful whether it was necessary for the plaintiff to plead the provision of the Registry Act in order to take advantage of it (*d*).

The defendants in a mortgage action filed a counterclaim claiming damages by reason of false and depreciatory statements with regard to the value of the mortgaged premises; an order was made striking out the counter-claim on the ground of inexpediency and inconvenience in trying the two causes of action together (*e*).

§236. *Interlocutory judgment.*

A mortgage, notwithstanding its legal form as a conditional conveyance, is regarded in equity as a security merely, subject to an equitable right to redeem after the legal or contractual right to redeem has been forfeited (*f*). In accordance with equitable principles the court will not usually decree immediate foreclosure in a mortgage action, but will allow the owner of the equity of redemption a period of six months before foreclosing him (*g*).

In the ordinary case in which there is no dispute as to the validity of the mortgage or other preliminary question re-

(*b*) *Wright v. Morgan*, 1877, 1 O.A.R. 613; *Cattanach v. Urquhart*, 1873, 6 O.P.R. 28.

(*c*) *Wright v. Morgan*, 1877, 1 O.A.R. 613.

(*d*) *Building & Loan Association v. Poaps*, 1896, 27 O.R. 470.

(*e*) *Odell v. Bennett*, 1889, 13 O.P.R. 10.

(*f*) See chapter 3, *Legal Mortgage in Equity*, §21.

(*g*) *Parker v. Housefield*, 1834, 2 My. & K. 419, 18 R.C. 497.

quiring a trial, interlocutory judgment may be obtained by the mortgagee on *præcipe* or on motion.

It is provided in Ontario by rule 466 as follows:

466. In a mortgage action where the defendants, or some of the defendants, are infants and default is made by the adult defendants and the official guardian does not desire to set up any defence, the plaintiff, upon filing affidavits showing such facts and circumstances as entitle him to judgment, may move for judgment in chambers, upon notice to the official guardian.

Where infants are defendants, but an adult defendant is a lunatic or person of unsound mind, judgment cannot be pronounced in chambers, but the motion must be made in court (*h*).

In an action for foreclosure, where an infant is defendant, the judgment, as well as the final order of foreclosure, should name a day to show cause within six months after he shall come of age (*i*). Where the judgment is for sale a day to shew cause is not reserved. If the infant defendant, upon attaining the age of twenty-one does not within the time named show good cause to the contrary the judgment or order will be binding upon him (*j*).

Sufficient evidence of "such facts and circumstances" as entitle the plaintiff to judgment would be afforded by an affidavit such as was prescribed (where the cause was heard in chambers) in order to take the bill *pro confesso*, and no reference to encumbrances was required) by former Chancery general order 432, in force at the time of the passing of the Judicature Act, namely,

An affidavit which is to state the amount advanced upon the security; the amount paid, whether by receipt of rent or otherwise;

(*h*) Warnock v. Prieur, 1887, 12 O.P.R. 264.

(*i*) Mellor v. Porter, 1883, 25 Ch. D. 158; London and Canadian Loan and Agency Co. v. Everitt, 1881, 8 O.P.R. 489; Mair v. Kerr, 1851, 2 Gr. 223.

(*j*) As to what cause an infant may show, see Seton on Decrees, 5th ed. 828 ff.

and the amount remaining due for principal and interest, distinguishing how much for principal and how much for interest. The affidavit is to state whether the mortgaged premises, or any part of them, have been in the occupation of the mortgagee or of any one under whom he claims; and, when there has been any such occupation, the affidavit is to state its nature, the time it continued, and the fair rentable value of the property (*k*).

Where the defendants are all adults and *sui juris*, judgment may be signed under rule 467, as follows:

467.—(1) Where the writ has been duly endorsed, and the defendant fails to appear, or by his statement of defence admits the execution of the mortgage and other facts entitling the plaintiff to a judgment, or where the defendant disclaims any interest in the mortgaged premises, or where no statement of defence is delivered, or where the defendant disputes the amount of the plaintiff's claim only, the plaintiff may sign judgment.

(2) Where the defendant has disputed the amount of the plaintiff's claim, he shall be entitled to four days' notice of the taking of the account. Where no reference as to the encumbrances is desired, such account may be taken by the officer signing judgment; whose finding shall be subject to appeal to a judge in chambers in the manner prescribed for appeals from the master in chambers.

(3) Where the writ has not been personally served, the claim of the plaintiff shall be duly verified by an affidavit which shall be filed with the officer taking the account.

This rule continues in substance the practice adopted in the Court of Chancery for Upper Canada on the 20th December, 1865. Since that date the plaintiff has been entitled to obtain on praecipe such an order as prior to that date would have been granted by the court on a hearing of the cause on the order to take the bill *pro confesso* (*l*).

It may be necessary to insert special provisions in the judgment. Thus, where the defendants pleaded tender, the master was directed to make enquiry on this point, and further directions and costs were reserved (*m*). And where the defendant

(*k*) Taylor & Ewart, Judicature Act, p. [208].

(*l*) Kirkpatrick v. Howell, 1875, 22 Gr. 94. See Chancery general order 435, in force when the Judicature Act was passed; Taylor & Ewart, Judicature Act, p. [209].

(*m*) Peers v. Allen, 1872, 19 Gr. 98.

pleaded payment in full, the costs were reserved (*n*). Where the defendants were rival claimants to the equity of redemption it was referred to the master to take the usual accounts and report, reserving the right to redeem to one of the defendants, with a proviso that if before the day appointed for payment the other defendant should establish his right to redeem, then he should redeem; and it was directed that the master should not delay his report upon the account pending the enquiry (*o*).

In special circumstances the court may on motion fix a time less than six months or may direct immediate foreclosure or sale. Where it appeared that the mortgaged property was not worth the amount due to the plaintiff, and that it was for the benefit of the infant defendants, judgment for immediate foreclosure was granted (*p*).

In a judgment obtained on a *præcipe*, however, no special terms may be inserted. Inasmuch as such a judgment is obtained *ex parte* and without the interposition of any judicial officer, the court wisely and almost necessarily keeps the plaintiff strictly within his rights and sets aside any judgment which contains provisions unwarranted by the practice (*q*).

The plaintiff may, or may not, take a reference to the master as to encumbrances. If he takes a reference unnecessarily he will not be entitled to the costs of it (*r*). If the plaintiff fails to take a reference, and it is afterwards discovered that

(*n*) *Gooderham v. DeGrassi*, 1850, 2 Gr. 135.

(*o*) *Rumsey v. Thompson*, 1860, 8 Gr. 372; *Robinson v. Dobson*, 1865, 11 Gr. 357; *Cayley v. Hodgson*, 1867, 13 Gr. 433.

(*p*) *Croxon v. Lever*, 1863, 12 W. R. 437; *Bennett v. Harfoot*, 1871, 19 W. R. 428; *Wolverhampton and Staffordshire Banking Co. v. George*, 1883, 24 Ch. D. 707.

(*q*) *Martin v. Evans*, 1917, 39 O.L.R. 479, at pp. 488, 490, 37 D.L.R. 376; *Elliott v. Byers*, 1917, 13 O.W.N. 107; *King v. Freeman*, 1867, 1 U.C. Ch. Ch. 350.

(*r*) *Purdy v. Parks*, 1883, 9 O.P.R. 424.

a subsequent encumbrance exists, he cannot obtain an interlocutory order to add parties in the master's office, as the only reference authorized by the rules is a reference by the judgment. But the court may amend the judgment so as to direct a reference in which case the former judgment and the proceedings under it will be treated as a nullity (*s*).

Where the plaintiff in an action for foreclosure or sale claims immediate judgment on the covenant he may sign judgment in the same manner as if that relief alone were sought. The officer entering judgment computes the amount to which the plaintiff is entitled, and the judgment directs payment forthwith (*t*).

If there are no subsequent encumbrances the account is taken by the clerk in chambers in the case of judgment being granted on motion under rule 466, and by the officer signing judgment in the case of judgment being signed under rule 467.

In the case of a married woman who is mortgagor the judgment will be in the usual form so far as foreclosure or sale is concerned, but in the event of judgment being recovered against a married woman upon her covenant for payment the paragraph in the judgment directing immediate payment must be modified (*u*).

Form 102 appended to the Ontario rules of practice is as follows:

Form of judgment on praecipe for Foreclosure or Sale, ACCOUNT TAKEN BY REGISTRAR and Orders for Immediate Payment and Delivery of Possession.

1. Upon reading the writ of summons issued in this action, and

(*s*) *Willgress v. Crawford*, 1888, 12 O.P.R. 658.

(*t*) The English practice is to order payment within one month after the date of the chief clerk's certificate; *Farrer v. Lacey*, 1883, 25 Ch.D. 636.

(*u*) See chapter 23, *Action on the Covenant*, §224, where the proper form of judgment against a married woman is set out.

an affidavit of service of the said writ and no appearance having been entered

2. This court finds that the subsequent interest at the rate of per centum per annum on the sum of principal money secured by the indenture of mortgage in the writ of summons [or pleadings] mentioned, up to the day of next, being the time appointed for payment as hereinafter mentioned amounts to , and that the costs of the plaintiff amount to which said subsequent interest and costs being added to the sum of claimed by the endorsement on the writ served on the defendant , make together the sum of

3. And upon the said defendant paying the said sum of into the bank at the between the hours of ten o'clock in the forenoon and twelve o'clock noon of the day of next, to the joint credit of the plaintiff and the Accountant of the Supreme Court [*where order for payment granted insert, or in case the plaintiff shall (where judgment is for sale, add, before the sale hereinafter directed shall have taken place)* recover the amount due to him under the order for payment hereinafter contained], it is ordered and adjudged, (subject to the provisions of section 3 of *The Mortgages Act*,) that the said plaintiff do assign and convey the mortgaged premises, and deliver up all documents relating thereto;

4. But in default of the said defendant making such payment by the time aforesaid, it is ordered and adjudged (*where judgment is for foreclosure, after "adjudged," add "that the said defendant do stand absolutely debarred and foreclosed of and from all equity of redemption in and to the mortgaged premises;" where a judgment is for sale, then after the words "adjudged" add "that the said premises be sold, with the approbation of the master at*)."

5. (*If judgment is for foreclosure omit this clause*). And it is further ordered and adjudged that the purchasers do pay their purchase money into court, to the credit of this cause, and that the same when so paid in be applied in payment of what has been found due to the said plaintiff together with subsequent interest and subsequent costs, to be computed and taxed by the said master, and that the balance do abide the further order of the court.

6. (*Where judgment is for immediate payment add:*) And it is further ordered and adjudged that the defendant do forthwith pay to the plaintiff the sum of being the amount due to him at the date hereof for principal money, interest and costs,

7. (*Where judgment is for recovery of possession add:*) And it is further ordered and adjudged that the defendant do forthwith deliver to the plaintiff , or to whom he may appoint, possession of the mortgaged premises, or of such part thereof as may be in the possession of the said defendant .

If default is made under paragraph 3, the plaintiff may apply for a final order of foreclosure (*v*). Paragraphs 3, 4 and 5 contain alternative provisions to be inserted in the event of the judgment being for sale instead of foreclosure (*w*).

Form 101 is as follows:

Form of Judgment on Præcipe for Sale or Foreclosure WITH REFERENCE AS TO INCUMBRANCES, etc., and orders for Immediate Payment and Delivery of Possession.

1. Upon reading the writ of summons issued in this action, and the statement of claim (*if any*) and an affidavit of service of the said writ on the defendant, and no appearance having been entered (*or and the defendant having made default in delivering a defence*),

2. It is ordered and adjudged that all necessary inquiries be made, accounts taken, costs taxed, and proceedings had for redemption or sale (*or redemption or foreclosure*) and that for these purposes this cause be referred to the master at

3. (*Where judgment is for immediate payment add, And it is further ordered and adjudged that the defendant do forthwith pay to the plaintiff the sum of \$, being the amount, due to him for principal money, interest and costs at the date hereof; and upon payment of the amount due to the plaintiff (when judgment is for sale add, before the sale hereinbefore directed shall have taken place) that (subject to the provisions of section 3 of The Mortgages Act, the plaintiff do assign and convey the mortgaged premises, and deliver up all documents relating thereto).*

4. (*Where judgment is for recovery of possession add, And it is further ordered and adjudged that the defendant do forthwith deliver to the plaintiff, or to whom he may appoint, possession of the lands and premises in question, in this cause, or of such part thereof as may be in the possession of the said defendant.*)

The general terms of paragraph 2 are authorized and their effect is defined by rule 519, as follows:

519.—(1) Any judgment in a mortgage action may direct in general terms that all necessary inquiries be made, accounts taken, costs taxed, and proceedings had for redemption or foreclosure, (*or for redemption or sale, as the case may be*) and that for these purposes the cause is referred to (*naming the master*).

(2) Any judgment directing a sale may so direct in general terms and refer the action to the master for that purpose.

(*v*) See *infra*, §244.

(*w*) As to a judgment for sale, see *infra*, §245.

(3) Any judgment directing partition or administration may be in general terms.

(4) Any judgment in general terms shall confer upon the master all the powers given by these rules and all other powers necessary to enable him to carry the judgment into full effect.

§237. *General conduct of the reference.*

The proceedings on the reference will be governed in Ontario by rules 402 to 459 (x) so far as they are in their terms applicable to a reference in a mortgage action and so far as they are consistent with the provisions specially applicable to mortgage actions contained in rules 460 to 490 hereinafter referred to.

The scope of the master's authority is thus discussed by Strong, J. in the Supreme Court of Canada (y) :

"The general practice of the Court of Chancery of Ontario, according in this respect with that which prevailed in England before the abolition thereof of the office of Master, is, that a question such as this, the invalidity of a mortgage deed, should be raised by the pleadings and adjudicated on by the Court at the hearing of the cause. We can find no exception to this cardinal rule of equity procedure save in some few respects, where the general orders of the Court of Chancery in Ontario have authorized the Master to deal with matters of account which formerly required special directions in the decree, and which have no relation to the present case. If the doctrine of the Court of Appeal were to prevail, it is hard to suppose any case in which the Master, under a reference to take the account in a mortgage suit, might not assume the jurisdiction to decide on the validity of the mortgage deed. If the mortgagors are to be at liberty to say in the Master's office, there is nothing due on this mortgage deed, because it was beyond the power of the Respondents as a corporation to make it, why should they not also be heard to say, there is nothing due because the deed was obtained by fraud? Unless some arbitrary line is to be drawn, the right of the Master, under such a reference, to enquire into the validity of the deed would, according to the doctrine of the Court below, be co-extensive with that of the Court at the hearing, embracing every case in which a mortgage might be impeached upon a ground which would have entitled the

(x) As to matters of accounting, see chapter 27, *Accounting between Mortgagor and Mortgagee*.

(y) *Bickford v. Grand Junction Ry. Co.*, 1877, 1 Can. S.C.R. 696, at p. 726.

mortgagor to have had it wholly set aside by decree or to have had the mortgagee's bill for foreclosure dismissed. We know of no authority for any such delegation of the functions of the Court to the Master."

§238. *Considering judgment and adding parties.*

It is provided in Ontario by rules 468 to 471 as follows:

468. Upon a reference under a judgment for foreclosure or sale or redemption of mortgaged property, the master shall enquire and state whether any person, and who, other than the plaintiff, has any lien, charge, or encumbrance upon the land and premises embraced in the mortgage security of the plaintiff, subsequent thereto.

469. The plaintiff shall bring into the master's office certificates of the registrar and sheriff of the county wherein the property lies, setting forth all the encumbrances which affect the property and such other evidence as may be necessary.

470. The master shall direct all such persons as appear to have any lien, charge or encumbrance upon the property in question, subsequent to the mortgage in question, to be made parties to the action, and to be served with a notice (form no. 43).

471. Any party served with such notice may apply at any time within ten days from the date of the service, to discharge, add to, vary, or set aside the judgment, or the order making him a party.

Form 43, referred to in rule 470, is as follows:

Notice to Encumbrancers.

Whereas an action has been instituted by the above named plaintiff for the foreclosure (or sale) of (or enforcement of a lien on) certain lands, (insert description of lands) and I have been directed by the judgment made in this cause, and dated the day of , to enquire whether any person other than the plaintiff has any charge or lien, or encumbrance upon the said estate. And whereas it has been made to appear before me that you have each some lien, charge or encumbrance upon the said estate, and I have therefore caused you to be made part to this action, and have appointed the day of , at o'clock in the noon, for you to appear before me, at my chambers at , either in person or by your solicitor, to prove your claims.

Now you are hereby required to take notice: 1st. That if you wish to apply to discharge my order making you a party, or to add to, vary, or set aside the judgment, you must do so within ten days after the service hereof; and if you fail to do so, you will be bound by the judgment, and the further proceedings in this cause as if you were originally made a party to the action. 2nd. That if you fail to attend at the time and place appointed, you will be treated as disclaiming all interest in the land in question, and it will be

dealt with as if you had no claim thereon, and your claim will be in fact foreclosed.

Dated this day of A.D. 19
W. L., Master

The enquiry is confined to *subsequent* encumbrancers, etc. As already pointed out, prior encumbrancers usually are not made parties at all and are not affected by the proceedings, but if some relief is sought against them, they must be made parties by writ (2).

The notice to subsequent encumbrancers added in the master's office must be served in the same manner as a writ of summons may be served. Within three days after service it must be endorsed by the person who served it with a memorandum of the day of the month and the day of the week of service, and the day on which this endorsement was made must be stated in the affidavit of service (a).

A person added as a party under rule 470 who contends that he should not have been made a party should apply under rule 471 within ten days after service. If a party so added does not move against the order and thus submits to it, he cannot in the master's office attack the plaintiff's mortgage as being fraudulent or *ultra vires* (b). It is, however, probable that he would be able to get relief by way of appeal from the master's report (bb), even though he has failed to move under rule 471, and it is clear that a party added in the master's office can get such relief if he is not an encumbrancer, for instance, if he is a tenant of the mortgagor who should be made a party by writ, if at all (c).

(2) See §234, *supra*.

(a) See rules 17, 3 (j).

(b) *McDougall v. Lindsay Paper Mill Co.*, 1884, 10 O.P.R. 247;
McDermott v. Bielschowsky, 1912, 22 M.R. 319, 3 D.L.R. 319.

(bb) See §240, *infra*.

(c) *McLaughlin v. Stewart*, 1901, 1 O.L.R. 295; *Cowan v. Allan*, 1896, 26 Can. S.C.R. 292.

There is no right and no necessity on the part of subsequent encumbrancers added in the master's office to move to vary the judgment for the purpose of questioning or reducing the amount owing on the mortgage as between the mortgagee and the mortgagor, it being open to the added parties to raise the question of value in the master's office (*d*).

Subsequent mortgagees, execution creditors (*c*) and mechanics lien holders (*f*) should be added in the master's office under rule 470. The registrar's and sheriff's certificates brought into the master's office under rule 469 will show what subsequent encumbrances or liens have been registered, or what executions have been placed in the sheriff's hands. It is sufficient that the certificate should be brought down to the day next following the issue of the writ of summons, but if the master has notice of a subsequent encumbrance or lien, though unregistered, the encumbrancer or lien holder should be made a party (*g*). If an encumbrancer or lien holder has died, his personal representative should be made a party (*h*).

A creditor of a mortgagee who has obtained an order attaching the mortgage debt but who has not obtained an order to pay over is not an encumbrancer within the meaning of the rule (*i*). A simple contract creditor who has not recovered judgment and issued execution has no right of redemption and is not a proper party (*j*).

(*d*) *Rutherford v. Rutherford*, 1896, 17 O.P.R. 228.

(*c*) Under rule 202 service upon an execution creditor may be effected by service upon the solicitor who issued the execution.

(*f*) *Jackson v. Hammond*, 1879, 8 O.P.R. 157; *Hynes v. Smith*, 1879, 27 Gr. 150; *Reinhardt v. Shutt*, 1888, 15 O.R. 325. As to the question of priority between a mortgage and a mechanics lien, see chapter 8, *The Registry Act*, §79.

(*g*) *Canadian Bank of Commerce v. Forbes*, 1885, 10 O.P.R. 442

(*h*) See chapter 13, *Persons entitled on Death of the Mortgagee* §§122, 123.

(*i*) *Crosbie v. Fenn*, 1879, 26 Gr. 283.

(*j*) *Nichol v. Allenby*, 1889, 17 O.R. 275.

It is provided in Ontario by the Judicature Act, R.S.O. 1914, c. 51, s. 36, that the institution of an action or the taking of a proceeding, in which any title to or interest in land is brought in question, shall not be deemed notice of the action or proceeding to any person not a party to it until a certificate of *lis pendens* is registered under the Registry Act or caution is registered under the Land Titles Act, but this provision does not apply to any action or proceeding for foreclosure or sale upon a registered mortgage.

The general rule is *pendente lite nihil innovetur*, and persons dealing with the lands which are the subject of the action take subject to the rights of the parties as declared in the action. Persons acquiring interests *pendente lite* need not be added as parties, and though not added are bound by the proceedings. Thus in an action by a mortgagee for foreclosure or sale a person who *pendente lite* takes a subsequent mortgage or other encumbrance on the lands need not be made a party (k). And where a judgment has been recovered against the mortgagor pending the action it is not necessary to make the judgment creditor a party (l).

Where in a foreclosure action a mortgagee had obtained a foreclosure order nisi, and subsequently a judgment creditor in another action, who had obtained the appointment of a receiver by way of equitable execution of the property of the mortgagor, applied to be added as a defendant to the foreclosure action, and asked that the period for redemption should be extended, the court made an order adding the applicant as a defendant but refused to extend the time for redemption, the applicant being bound to take his interest in the equity of redemption in the state in which he found it (m).

(k) Robson v. Argue, 1878, 25 Gr. 407.

(l) Wallbridge v. Martin, 1868, 2 Chy. Ch. (Ont.) 275.

(m) In re Parbola, Blackburn v. Parbola, [1909] 2 Ch. 437; cf. Gibson v. Nelson, 1901, 2 O.L.R. 500, at p. 505, 35 Can. S.C.R. 181; Wasson v. Harker, 1912, 5 S.L.R. 364, 8 D.L.R. 88.

The general rule is that all persons interested in the ultimate equity of redemption, other than persons having subsequent liens, charges or encumbrances, should be made defendants by writ, but in Ontario under rule 490 the court may order persons who are interested in the equity of redemption other than those who are already parties by writ to be made parties in the master's office (n).

In addition to the notice to be served upon subsequent encumbrancers added in the master's office under rule 470 above mentioned, an appointment must be served upon subsequent encumbrancers who are already parties and a notice must be given to all the defendants by writ, as required by rules 403 and 472, as follows:

403. Unless otherwise directed by the master, notice of the first proceeding before him shall be given to every party affected by or interested in the enquiry though any such party may not have appeared or pleaded in the action.

472. The master before he proceeds to hear and determine shall require an appointment (form no. 44) to be served upon all persons made parties before the judgment appearing to have any lien, charge or encumbrance upon the lands in question, subject to the plaintiff's mortgage, and shall in the notice to the defendant by writ, required by rule 403, state the names and nature of the claims of those so notified, and of those added under the provisions of rule 470 as appearing to have a lien, charge or encumbrance upon the said lands, and such notice may be in the form 45.

Form 44, referred to in rule 472, is as follows:

Notice to parties by writ having encumbrances.
(Court and Cause).

Having been directed by the judgment in this action to enquire whether any person other than the plaintiff has any lien, charge or encumbrance upon the lands in question in this action subsequent to the plaintiff's claim, and to take an account of the amount due to the plaintiff and any such person. And it having been made to appear that you may have some lien, charge or encumbrance thereon you are hereby notified that I have appointed day, the
day of next at my chambers in the Court House
at at o'clock to proceed with the said enquiry and to determine the amount of the claim of the plaintiff,

(n) See §234, *supra*.

and of such encumbrancers as may come in and prove their claims before me.

If you fail to attend upon such appointment, and to prove your claim, the reference may proceed in your absence, and you will receive no further notice of the proceedings in this action, and you will be treated as disclaiming any lien, charge or encumbrance upon the said lands, and will stand foreclosed from any such claim.

Dated this day of 19 .

W. L., Master.

Form 45, referred to in rule 472, is as follows:

Notice to all original defendants.

(Court and Cause.)

Having been directed by the judgment in this action to enquire whether any person other than the plaintiff has any lien, charge or encumbrance upon the lands in question in this action subject to the plaintiff's claim thereon.

You are hereby notified that it has been made to appear to me that the persons named in the schedule hereto may have some lien, charge or encumbrance thereon, and I have, therefore, caused such of them as are not already parties thereto to be added as parties in my office, and have appointed day, the day of

next in my chambers in the Court House at

at o'clock, to enquire and determine whether the said parties have any such lien, charge or encumbrance, and to fix and ascertain the amount thereof, and the amount of the plaintiff's claim upon his security.

If you do not then and there attend, the reference will be proceeded with in your absence, and you will receive no further notice of the proceedings in this action.

Dated this day of 19 .

W. L., Master.

SCHEDULE.

Encumbrancer.

E.g.

Nature of Claim.

- | | |
|-------|------------------|
| A. B. | Mortgage dated. |
| C. D. | Execution. |
| E. F. | Mechanic's lien. |

Rule 403 forms an exception to rule 35 by which it is provided:

35. Except where otherwise provided or otherwise ordered a defendant who fails to appear shall not be entitled to notice of any subsequent proceedings in the action.

Under rule 200, if a defendant served with a writ of sum-

mons has not appeared thereto, all documents not requiring personal service shall, unless the court otherwise directs, be deemed to be sufficiently served by posting up a copy in the office in which the proceedings are being carried on. As it appears to be doubtful whether this rule applies to any proceedings after judgment (*o*), it would be safer to serve the notice required by rule 403 personally unless the master otherwise directs. The master will probably not direct service by posting up if the defendant appears to have some substantial interest.

§239. *Taking accounts and appointing day for redemption.*

On the day named in the appointment and notices issued pursuant to rules 470 and 472 the plaintiff should bring into the master's office affidavits proving that service has been effected on the various parties. As already noted, the affidavit of service of form 43 should be in the form prescribed in the case of the service of a writ of summons.

It is provided by rule 473 as follows:

473. Where a person who has been duly served with a notice under rule 470 or with an appointment under rule 472 neglects to attend at the time appointed, the master shall treat such non-attendance as a disclaimer by the person so making default; and any claim of such person shall be thereby foreclosed, unless otherwise ordered upon application duly made for that purpose.

It is not the usual practice for the plaintiff to obtain a special order in chambers declaring such parties foreclosed. They will be mentioned in the master's report as having made default, and may be declared foreclosed by the order subsequently obtained for the purpose of foreclosing the person who by the report is first called upon to redeem, in the event of his not redeeming (*p*).

(*o*) See *Tilling v. Blythe*, [1899] 1 Q.B. 557, in which it was held that notice of motion for the appointment of a receiver by way of equitable execution could not be served by posting up under the rule.

(*p*) See §240, *infra*.

Notwithstanding his default, the subsequent encumbrancer will in some cases be allowed to come in and prove his claim. Thus an encumbrancer who has been foreclosed by the master's report was admitted to prove his claim on explaining his neglect to come in and undertaking to rank after a puisne encumbrancer who had already proved his claim (*q*). In another case a subsequent mortgagee who also held a mortgage on other property of the mortgagor, was allowed after report, on payment of costs, to consolidate his claim and prove on the other mortgage (*r*). The application for leave to be let in should be made to the master, unless he has made his general report, in which case he is *functus officio* and the application must be made in chambers.

It is provided by rule 474 as follows:

474. When all parties have been duly served, the master shall take an account of what is due to the plaintiff, and to the other encumbrancers (if any), for principal money and interest, and tax their costs, and settle their priorities, and appoint a time and place, or times and places, for payment according to the practice of the court.

(a) *Proof of claims of encumbrancers.*

The plaintiff and the subsequent encumbrancers should bring in affidavits proving what is due to them respectively and should produce their mortgages (*s*).

It is provided by rule 475 as follows:

475. On any proceeding for foreclosure by, or for redemption against an assignee of a mortgagee, the statement of the mortgage account, under the oath of such assignee, shall be sufficient *prima facie* evidence of the state of such account, and an affidavit or oath shall

(*q*) *Becher v. Webb*, 1879, 7 O.P.R. 445.

(*r*) *Ross v. Stevenson*, 1877, 7 O.P.R. 126; *Cameron v. Wolfe Island Co.*, 1873, 6 O.P.R. 91.

(*s*) As to matters of accounting, see chapter 27, *Accounting between Mortgagor and Mortgagee*.

not be required from the mortgagee or any intermediate assignee denying any payment to such mortgagee or intermediate assignee, unless the mortgagor or his assignee, or the party proceeding to redeem, denies by oath or affidavit the correctness of such statement of account.

The claim of an encumbrancer is *prima facie* proven in the master's office by the production of the mortgage deed, and the filing of an affidavit verifying the encumbrancer's claim and stating the amount due him for moneys advanced by him to the mortgagor and secured by the mortgage; and the onus of reducing the amount rests on the plaintiff (*t*).

Where the plaintiff proved his mortgage deed and it appeared therein that certain instalments of interest were overdue, it was held that the plaintiff had made out a case *prima facie* and could not be called on to prove non-payment of the interest; and that the onus of proving payment lay on the defendant (*u*).

The mortgagor is at liberty to shew in the master's office what sum was really advanced on the mortgage (*v*), but if the mortgagee is dead the evidence must be clear in order to reduce the amount below the amount appearing on the face of the mortgage (*w*). The parties may shew that the mortgage was in reality made for some purpose other than that apparent on its face, for example, that it was given as collateral security for a promissory note (*x*).

When the bill has been taken *pro confesso* it is incumbent on the master to require the mortgagee to show how the money

(*t*) Court v. Holland, 1880, 8 O.P.R. 213; Warren v. Taylor, 1862, 9 Gr. 59; Elliott v. Hunter, 1876, 24 Gr. 430.

(*u*) Markle v. Ross, 1889, 13 O.P.R. 135.

(*v*) Penn v. Lockwood, 1850, 1 Gr. 547. See also Brownlee v. Cunningham, 1867, 13 Gr. 586; Morrison v. Robinson, 1872, 19 Gr. 480.

(*w*) Fraser v. Locie, 1863, 10 Gr. 207.

(*x*) McIntyre v. Thompson, 1884, 6 O.R. 710; Brownlee v. Cunningham, 1867, 13 Gr. 586; Morrison v. Robinson, 1872, 19 Gr. 480.

secured by the mortgage was advanced, and *semble*, such a course is desirable in all cases (y).

In the case of a mortgagee who is or has been in possession, the affidavit filed by him should verify an account showing all sums which have become due for principal and interest and all sums which have been paid by him in necessary repairs and lasting improvements or for other purposes, as well as the rents and profits received by him, with particulars of the times when, and the persons to or from whom, and the purposes for which, the money was paid or received (z).

(b) *Taxation of costs.*

The plaintiff should bring into the master's office his bill of costs for taxation. According to the usual practice in Toronto the master endorses on the bill a request to the taxing officer to tax the costs. The plaintiff then obtains an appointment from the taxing officer, gives notice of the appointment to the other parties who have appeared or who have been presented in the master's office and who may desire to attend on the taxation, and after taxation brings into the master's office the taxing officer's certificate. The costs of the subsequent encumbrancers are usually fixed in the master's office (a).

(c) *Settling priorities.*

The priorities *inter se* of holders of liens, charges or encumbrances will usually depend upon the dates on which the claims were registered (b), and the priorities of all parties who prove

(y) *Sterling v. Riley*, 1862, 9 Gr. 343.

(z) See *Holmsted & Langton, Forms and Precedents*, 2nd ed., nos. 1026, 1027 and 1028. Other forms are nos. 1024, 1025 (affidavit by mortgagee not in possession), 1029, 978 (affidavit by subsequent encumbrancer), 1030 (affidavit by execution creditor).

(a) As to what costs are taxable by the mortgagee against the mortgagor, see chapter 30, *Costs*.

(b) See chapter 8, *The Registry Act*, chapter 9, *Consolidation*

their claims in the master's office will be stated in the master's report (c).

Where there was a dispute between two persons as to who was entitled to an encumbrance, and there were questions which the master was not competent to decide or which could not conveniently be decided in the master's office, it was held that the master's proper course was to report that the encumbrance was a valid charge, to find its priority, to state who claimed to be entitled to it, and to leave the respective claimants to take such proceedings to settle their respective rights as they might be advised (d). A party may, before the report is made, appeal from the ruling of the master as to the admissibility of evidence (e) or as to the principle upon which the mortgage account should be taken (f).

(d) *Appointment of time and place for redemption.*

It is provided by rule 489 as follows:

489. In mortgage actions the period allowed for redemption in the first place shall be six months and when it becomes necessary to fix a date for redemption after the lapse of the first period the further time allowed shall be one month.

The master should appoint a day for redemption (g) but if he omits to do so an order appointing a day may be made in chambers (h). If subsequent encumbrancers have proved their claims in the master's office, the practice under a judgment for foreclosure in Ontario is in the first instance to ap-

and Tacking, and chapter 10, *The Land Titles Acts*. These chapters include a discussion of the relative priorities of mortgages, executions and mechanics liens.

(c) As to the master's report, see §240, *infra*.

(d) *McDonald v. Wright*, 1866, 12 Gr. 552.

(e) *McDonald v. Wright*, *supra*.

(f) *Court v. Holland*, 1881, 29 Gr. 19.

(g) Care should be taken not to appoint a Sunday or other non-judicial day. *Holcumb v. Leach*, 1852, 3 Gr. 449.

(h) *King v. Connor*, 1863, 10 Gr. 364.

point a day six months in the future for redemption by the first subsequent encumbrancer, and if he fails to redeem then to appoint a day for redemption by the next subsequent encumbrancer, and so on successively, each encumbrancer on failing to redeem being foreclosed (*i*). If no subsequent encumbrancer proves his claim a day is appointed for redemption by the owner of the ultimate equity of redemption.

In England (*j*) the tendency of the court is to give one period for redemption, and not to allow successive opportunities to redeem, but the persons who have a subsequent right of redemption may according to priority be allowed further periods to redeem (*k*). Where, however, there are conflicting claims as to priority among several subsequent encumbrancers, one day only will be allowed to all the defendants without prejudice to their priorities *inter se* (*l*).

The mortgagor is not entitled to more than one period of six months for redemption, and successive periods will not as a rule be granted at his request, although they may be granted at the request of subsequent encumbrancers.

In *Platt v. Mendel* (*m*) Chitty, J. said:

"It is an anomaly to say that the mortgagor by any dealings with the equity of redemption subsequent to the first mortgage should be able to gain for himself a right to a further time to redeem."

Where portions of the mortgaged lands are conveyed away by the mortgagor, only one day for payment will be given to

(*i*) *Infra*, §241. Under a judgment for sale the practice is to allow one period not successive periods for redemption. See §245, *infra*.

(*j*) See 2 W. & T.L.C. Eq. 57, 58.

(*k*) *Smithett v. Hesketh*, 1890, 44 Ch.D. 161. In Manitoba it was held that only one period of six months should be allowed for redemption to the mortgagor and subsequent incumbrancers, the English practice being followed in preference to that of the Ontario courts: *Rice v. Murray*, 1884, 2 M.R. 37.

(*l*) *Bartlett v. Rees*, 1871, L.R. 12 Eq. 395; *Platt v. Mendel*, 1884, 27 Ch.D. 246; *Smithett v. Hesketh*, 1890, 44 Ch.D. 161.

(*m*) 1884, 27 Ch.D. 246.

all the persons interested in the equity of redemption (*n*), but where a mortgage provides that in case of sale the mortgagee on receipt or tender of a certain proportion of the purchase money shall release the part sold from the mortgage, each purchaser is entitled to redeem his own part, on payment of the stipulated proportion of the money, and the master should appoint one day for each of the several purchasers to redeem his respective portion (*o*).

A subsequent encumbrancer and all persons claiming under him are entitled to but one period of redemption (*p*).

If two or more execution creditors are made parties in the master's office and prove their claims, they are not entitled to successive periods for redemption, and one day will be appointed for redemption by both or all of them (*q*), unless an encumbrance intervenes. In the event of an encumbrance intervening, a day will be appointed for redemption by the prior execution creditors, then a day for redemption by the intermediate encumbrancer, and then a day for redemption by the subsequent execution creditors.

It is provided in Ontario by rule 430 as follows:

430.—(1) Where the master is directed to appoint money to be paid at some time and place, he shall appoint the same to be paid into some bank to the joint credit of the party to whom the same is made payable and the accountant; the party to whom the same is made payable may name the bank into which he desires the same to be paid.

(2) Where money is paid into a bank, in pursuance of such appointment, the party paying may pay the same either to the credit of the party to whom the same is made payable, or to the joint credit of the party and the accountant; and if the same be paid to the sole credit of the party, such party shall be entitled to receive the same without order.

(*n*) *Hill v. Forsyth*, 1859, 7 Gr. 461.

(*o*) *Davis v. White*, 1869, 16 Gr. 312.

(*p*) *Loveday v. Chapman*, 1875, 32 L.T. 689; *Beever v. Luck*, 1867, L.R. 4 Eq. 537.

(*q*) *Bates v. Hillcoat*, 1852, 16 Beav. 139; *Ardagh v. Wilson*, 1867, 1 U.C. Ch. Ch. 389. Apparently the older practice in Upper Can-

(3) When money is paid to the joint credit of the accountant and the party entitled, the accountant shall sign the cheque for payment out upon the production of the consent of the party paying in, duly verified, or of his solicitor, or in the absence of such consent upon the order of a judge.

§240. *The master's report.*

The findings of the master, resulting from the enquiries and proceedings in his office outlined above, and the appointment of a day for redemption are embodied in his report.

It is provided by rule 476 as follows:

476. The master's report shall state the names of all persons who have been made parties in his office, and who have been served with the notice or appointment hereinbefore provided for, and the names of such as have made default, and shall set forth the amount of the claims, and priorities of such as have attended, and these latter shall be certified as the only encumbrancers upon the property.

If a subsequent encumbrancer added in the master's office proves his claim, a day will be named in the report for redemption by him, or if two or more subsequent encumbrancers prove their claims, a day will be named for redemption by the first subsequent encumbrancer. If no subsequent encumbrancer proves his claim, a day will be named for redemption by the owner of the equity of redemption (*r*). There are well settled forms of report suited to the particular circumstances (*s*).

As to the meaning of the terms "report" and "certificate" of a master it has been said:—

"Though we apply the term "report" to the more lengthened productions of a Master, and the term "certificate" to his shorter statements, it is, I think, clear that all his reports are certificates, and all his certificates are reports" (*t*).

The certificate of a master as to any matter arising upon

(*r*) See §239, *supra*.

(*s*) See Holmested & Langton, *Forms and Precedents*, 2nd ed., nos. 1070, 1071, 1072, 1080; Bell & Hoyles, *Practice Forms*, nos. 642, 643.

(*t*) *Chennel v. Martin*, 1833, 4 Sim. 340, Shadwell, V.-C.

a reference is a report upon the matter and subject to the same rules as an ordinary report (*u*).

An application to let in further evidence may be made to the master at any time before he signs the report (*v*). After the report is signed, the master is *functus officio*, and the application must be made to the court (*w*), and after signing the report the master should not certify further as to the matters that were before him on the reference, unless required by the court to do so (*x*).

It is provided by rules 427 and 429 as follows:

427. As soon as the master's report is settled and signed it shall be delivered out to the party prosecuting the reference, or in case he declines to take the same, then, in the discretion of the master, to any other party applying therefor.

429. Any party affected by a report may file the same, or a duplicate thereof. He shall forthwith serve notice of filing.

No notice need be given to a defendant by writ who has not appeared (*y*), or to a party added in the master's office who has not proved his claim.

Rule 502 provides:

502. Every report or certificate of a master shall be filed and shall be deemed to be confirmed at the expiration of fourteen days from the date of service of notice of filing the same, unless notice of appeal is served within that time.

If all parties interested in the report consent, but not otherwise, an order may be obtained in chambers confirming the report before the expiration of the fourteen days (*z*).

(*u*) *Re Molphy, Beckes v. Tiernan*, 1896, 17 O.P.R. 247.

(*v*) *Re Ritchie, Sewery v. Ritchie*, 1876, 23 Gr. 66.

(*w*) *O'Donohue v. Hembroff*, 1873, 9 U.C.L.J. 312.

(*x*) *Rosebatch, v. Parry*, 1879, 27 Gr. 193.

(*y*) *Currie v. Sperer*, 1915, 9 O.W.N. 174.

(*z*) *Patterson v. Gilbert*, 1888, 12 O.P.R. 652.

The report must be filed before notice of appeal therefrom is served (a).

Rules 503 and 504 provide:

503. An appeal from the report or certificate of a master or referee shall be to the court upon seven clear days' notice, and shall be returnable within one month from the date of service of notice of filing of the report or certificate.

504. An appeal shall lie under the two preceding rules from every decision of a master, except an order made under the authority of rule 433.

It is provided by rules 433 and 505, as follows:

433.—(1) The master shall have the same power, authority, and jurisdiction, as the master in chambers, in respect to all matters referred to him, or which may arise in his office.

505.—(1) A person affected by an order of the master in chambers, a local judge or a local master, or other officer in chambers, or of a master under the authority of rule 433, may appeal therefrom to a judge in chambers.

(2) The appeal shall be by motion, on notice served within four days and returnable within ten days after the decision complained of.

When the master's report has been confirmed, a person who is certified therein as having a lien, charge or encumbrance acquires by the adjudication of the court a new status which is independent of the circumstances upon which his claim was based prior to the confirmation of the report. Thus, four execution creditors who had proved their claims in the master's office and had been certified in the master's report (which was duly confirmed) as the only subsequent encumbrancers, assigned their claims to one Swanson, who redeemed the plaintiff's mortgage. The master then took a subsequent account as between him and the mortgagor with respect to the mortgage and the judgments and appointed a day for payment of the whole amount by the mortgagor. After confirma-

(a) *Hayes v. Hayes*, 1881, 8 O.P.R. 546.

tion of the second report of the master, and before the day appointed for payment, the mortgagor made an assignment for the benefit of his creditors to one Scott, upon whose application an order was made adding him as a party, extending the time for redemption, and directing a reference back to the master to take a new account and appoint a new day for redemption. It was held that, although an assignment for the benefit of creditors is entitled to priority over "executions not completely executed by payment," Scott was entitled to redeem only on payment of the total amount of the mortgage and the judgments, and not on payment of the mortgage only. Swanson's claim was based upon the master's report, and so far as the mortgaged land was concerned he could not have enforced the executions and was not obliged to keep them alive by renewals (b).

§241. *Subsequent accounts and appointment of new day for redemption.*

If the first subsequent encumbrancer fails to redeem within the period of six months allowed to him for that purpose an order may be obtained in chambers declaring him to be foreclosed. If he redeems he may proceed with the action for the purpose of foreclosing the encumbrancers subsequent to himself, if any, and the owner of the ultimate equity of redemption. In either case it will be necessary that a new day should be appointed for redemption by the next encumbrancer, or the owner of the equity as the case may be, and that a new account should be taken of the amount to be paid on such new day. In the case of the first subsequent encumbrancer having redeemed, the amount so to be paid will include the amount owing on his mortgage as well as the amount paid by him to redeem the plaintiff's mortgage (c).

(b) *Federal Life Assurance Co. v. Stinson*, 1906, 13 O.L.R. 127, affirmed, 1907, 39 Can. S.C.R. 229, *sub nom.* *Scott v. Swanson*.

(c) See, for instance, *Federal Life Assurance Co. v. Stinson*, *supra*.

In England it is the practice on taking the subsequent account, to allow interest on the gross sum of principal, interest and costs, found due by the last preceding report (*d*), but in Ontario it has not been customary to allow interest upon interest with respect to an encumbrancer's own claim unless the mortgage expressly provides therefor. Where, however, a subsequent encumbrancer pays off a prior encumbrance, he is entitled to interest on the aggregate amount paid by him for principal, interest and costs, the interest on the principal being computed at the rate reserved in his own encumbrance, that on the interest and costs at the statutory rate only (*e*).

Where the plaintiff after the taking of the account paid a sum for insurance under a provision in the mortgage deed, the master in taking a subsequent account allowed the sum together with interest thereon (*f*).

If there are several successive encumbrancers who have proved their claims in the master's office, it will be necessary to have successive new accounts taken and successive new days appointed for redemption until finally an account is taken and a day is appointed for redemption by the owner of the ultimate equity of redemption.

It is provided by rule 477 as follows:

477. Subsequent accounts shall, from time to time, be taken, subsequent costs taxed, and necessary proceeding had, for redemption by, or foreclosure of, the other parties entitled to redeem the mortgaged premises, as if specific directions for all these purposes had been contained in the judgment.

If a subsequent encumbrancer does not redeem pursuant

(*d*) *Elton v. Curteis*, 1881, 19 Ch.D. 49; cf. *Jacob v. Earl of Suffolk*, 1728, Mosely 27.

(*e*) *McMaster v. Hector*, 1872, 8 C.L.J. 284; *Holmsted*, Ontario Judicature Act, 4th ed., p. 1069.

(*f*) *Bethune v. Calcutt*, 1853, 3 Gr. 648.

to the report, it is not usually necessary that any subsequent proceedings should be taken in the master's office or that a new report should be made by him, because by the order made in chambers declaring the first subsequent encumbrancer foreclosed a new day may be appointed for redemption by the next encumbrancer and a new amount named including interest to the day appointed. But if the subsequent accounts are of such nature as to require notice to be given to the defendants so that they may attend on the taking of the accounts, or if a subsequent encumbrancer redeems the plaintiff, the proper procedure would be to obtain an appointment from the master to proceed with the reference (*g*).

In order to obtain an order declaring a subsequent encumbrancer foreclosed, the plaintiff must file a certificate of the local manager or agent of the bank to which the money was directed to be paid, verified by affidavit of execution (*h*), and an affidavit of the plaintiff proving non-payment of the debt and that the plaintiff has not been in possession or in receipt of the rents and profits of the land, or as the case may be (*i*).

According to the former practice a period of three months was given to each subsequent encumbrancer after the first, but it is now proved by rule 489 that when it becomes necessary to fix a date for redemption after the lapse of the first period of six months the further time allowed shall be one month.

If the first subsequent encumbrancer redeems the plain-

(*g*) For forms of report on taking subsequent accounts in a case where a subsequent encumbrancer has not redeemed, and in a case where he has redeemed, respectively, see Bell & Hoyles, Practice Forms, nos. 644, 645; Holmsted & Langton, Forms and Precedents, 2nd ed., nos. 1076, 1079.

(*h*) See Bell & Hoyles, Practice Forms, nos. 646, 647; Holmsted & Langton, Forms and Precedents, 2nd ed., nos. 596, 597.

(*i*) See Bell & Hoyles, Practice Forms, nos. 637, 638, 639; Holmsted & Langton, Forms and Precedents, 2nd ed., nos. 598, 599, 600.

tiff's mortgage he will be entitled to a conveyance of the mortgaged property or an assignment of the plaintiff's mortgage, at his option.

It is provided by rule 482 as follows:

482. Subject to the provisions of *The Mortgages Act*, upon payment of the amount found due, the mortgagee shall, unless the judgment otherwise directs, assign and convey the mortgaged property to the party making the payment, or to whom he may appoint, free and clear of all encumbrances done by him, and shall deliver up all deeds and writings in his custody or power relating thereto.

The reference in the rule just quoted is to s. 3 of the *Mortgages Act*, under which the person paying is entitled to require the mortgagee to assign the mortgage instead of conveying the mortgaged property (j).

The proceedings may then be continued at the instance of the first subsequent encumbrancer in order of the plaintiff. The next encumbrancer may in turn redeem the two prior mortgages and himself continue the proceedings for the purpose of foreclosing the encumbrancers, subsequent to his own, if any, and the owner of the ultimate equity of redemption.

It is difficult to imagine a procedure more perfectly adapted to give effect successively to the rights of mortgagees and owners of the equity of redemption according to their several priorities than the equitable procedure in a foreclosure action embodied in modern rules of practice. Every encumbrancer in turn has his opportunity of acquiring the mortgaged property by paying all charges prior to his own and foreclosing all claims subsequent to his own, subject to the right of any person having a subsequent interest in the property to redeem — the price of redemption in every case being the total of the claims of all prior encumbrancers who have proved their claims in the master's office together with interest to the time of payment and the costs of the prior encumbrancers.

(j) See chapter 20, *Right to Assignment of the Mortgage*.

§242. *Stay of action on payment of arrears.*

As has been already pointed out a mortgagee is entitled to bring an action for foreclosure or sale even though the mortgagor is in default only in respect of an instalment of principal or interest, provided the default is a breach of the proviso for reconveyance or defeasance and therefore causes forfeiture at law (*k*).

It is, however, provided in Ontario by rule 485, as follows:

485.—(1) In an action for foreclosure or sale, or for recovery of possession of any mortgaged property for default in the payment of interest, or of an instalment of the principal, the defendant may, before judgment or after judgment, but before sale or final foreclosure or recovery of possession of the mortgaged property, move to stay the action upon payment of the amount then due for principal, interest and costs.

(2) Any action so stayed may upon subsequent default in the payment of a further instalment of the principal, or of interest, be proceeded with by leave of the court.

In order to take advantage of the rule the defendant need not pay a fractional part of an instalment of interest. It is sufficient if he pays the interest up to the last gale day (*l*).

The opinion has been expressed that the rule entitles the mortgagor to relief from the effect of an acceleration clause (*m*), but it seems clear that if the whole of the mortgage money has become due by virtue of an acceleration clause, the defendant is not entitled to relief under rule 485, upon payment merely of the overdue instalment or instalments and costs, because the "amount then due" would be the whole of the mortgage money, but the defendant may be entitled to relief under the terms of the acceleration clause itself (*n*).

(*k*) §231, *supra*.

(*l*) *Strachan v. Murney*, 1858, 6 Gr. 378.

(*m*) *Gemmill v. Burn*, 1878, 7 O.P.R. 381; cf. *Knapp v. Cameron*, 1858, 6 Gr. 559; *sed vide Tylee v. Hinton*, 1878, 3 O.A.R. 53, at pp. 59, 60.

(*n*) *National Trust Co. v. Campbell*, 1908, 17 M.R. 587. In this case the defendant was held entitled to relief under a provision of the

Rule 485 does not apply to an action upon the covenant only (*o*) or to proceedings under a power of sale, though in either case the mortgagor may be entitled to relief under the terms of the acceleration clause (*p*).

§243. *Change of state of the account.*

It is provided in Ontario by rule 484 as follows:

484.—(1) Where the state of the account ascertained by a judgment order or report is changed before the final order is obtained, the mortgagee may either before or after the day appointed for payment apply *ex parte* to fix, by reference to a master or otherwise, the amount to be paid in lieu of the amount previously ascertained or where the day appointed for payment has not arrived may give notice to the party by whom the money is payable that he gives him credit for a sum certain, to be named in the notice, and that he claims that there remains due in respect of such mortgage money a sum certain, to be also named in the notice.

(2) Where the application is made after the day appointed for payment, and in other cases if so desired, a new day for payment shall be appointed.

(3) Where notice of credit has been given, if the sums named therein appear proper to be allowed and paid, the final order may be granted without further notice; but the party to whom the notice of credit is given may apply to fix, by reference to a master or otherwise, the amounts proper to be allowed and paid instead of the amounts mentioned in the notice.

Before a final order of foreclosure is made, the mortgagor is entitled to know how much he must pay in order to redeem. The modes in which that amount may be ascertained, if there has been a change of account since the report, are indicated in rule 484, and it is not sufficient for the plaintiff to state

Real Property Act of Manitoba expressed in terms similar to the relieving provision of the acceleration clause contained in schedule B to the Short Forms of Mortgages Act. As to this relieving provision, see chapter 23, *Action on the Covenant*, §226. See also *Thomson v. Willson*, 1915, 51 Can. S.C.R. 307, 23 D.L.R. 468, varying *Willson v. Thomson*, 1914, 31 O.L.R. 471, 19 D.L.R. 593

(*o*) *Wilson v. Campbell*, 1893, 15 O.P.R. 254.

(*p*) *Todd v. Linklater*, 1901, 1 O.L.R. 103. See chapter 23, §226.

on affidavit that the payments made by him for taxes and costs have more than exhausted the rents received since the date of the report (*q*).

A mortgagee obtained an order nisi for foreclosure. After the order had been made he, under the terms of the mortgage, paid a further sum for taxes. There was, however, no evidence that such payment was necessary to protect the security. He now applied for an order increasing the amount to be paid under redemption, and fixing a new date for redemption. The mortgagor had been served, but did not appear. It was held that as the mortgagor had not appeared and would in any event be required to pay the taxes and as reasonableness and convenience should be the basis of practice an order should be made for a new account and a new date for redemption, and that as it had not been shown that the payment of taxes was necessary to protect the security and as the mortgagee could have insisted upon payment before redemption, the costs of the application should be borne by the mortgagee (*r*).

§244. *Final order of foreclosure.*

If a defendant fails to pay on or before the day appointed for redemption by him, a final order of foreclosure may be made (*s*). The plaintiff may become entitled to a final order either under a judgment without a reference where there are no subsequent encumbrancers and the defendants by writ have failed to redeem within the period of six months allowed by

(*q*) *Independent Order of Foresters v. Pegg*, 1900, 19 O.P.R. 254. See also *Manitoba and Northwest Loan Co. v. Scobell*, 1885, 2 M.R. 125.

(*r*) *Mathew v. McLean*, 1908, 2 S.L.R. 301.

(*s*) Subject to rule 485, authorizing a stay of the action in case of payment of the arrears (§242), and to rule 484, requiring a new account to be taken and a new day to be appointed in certain cases, where the state of the account has been changed between the judgment or report and the day appointed for redemption (§243).

the judgment for redemption, or under a judgment with a reference as to subsequent encumbrancers and under the subsequent reports or orders appointing successive days for redemption where the subsequent encumbrancers and the defendants by writ have failed to redeem.

It is provided in Ontario by rule 486, as follows:

486. In default of payment according to the report in a foreclosure action, a final order of foreclosure may be granted against the party making default, on an *ex parte* application.

A judgment for foreclosure without final order is not a good defence to an action for redemption (*t*), but as a result of the final order the foreclosure which has been conditional (foreclosure nisi) becomes absolute. . . . "the effect of an order of foreclosure absolute is to vest the ownership of, and the beneficial title to, the land, for the first time, in the person who previously was a mere encumbrancer. The equitable estate of the mortgagor is then forfeited and transferred to the mortgagee. It is transferred as effectually as if it had been conveyed or released." (*u*).

The ordinary form of final order of foreclosure is that the defendant do stand absolutely debarred and foreclosed of and from all right, title and equity of redemption of, in and to the mortgaged premises. In the case of a legal mortgage, as the legal estate is already vested in the mortgagee, the effect of the order is to leave the estate vested in him free from the equitable claim. In the case of an equitable mortgage, however, something more is required, and a judgment for foreclosure should be perfected by a direction—not always given but necessarily consequent—that the mortgagor convey

(*t*) *Senhouse v. Earl*, 1752, 2 Ves. Sen. 449.

(*u*) *Heath v. Pugh*, 1881, 6 Q.B.D. 345, Lord Selborne, L.C. at p. 360, 16 R.C. 376, at p. 384, S.C. *sub nom.* *Pugh v. Heath*, 1882, 7 App. Cas. 235, 16 R.C. 389. As to the decision in this case, see chapter 26, *Limitation of Actions*, §274.

the mortgaged land to the mortgagee, so as to complete his irredeemable title by legal ownership (*v*), or an order should be made vesting the land in the mortgagee, subject of course to any claims relating to the land which have priority over the equitable mortgage.

The application for a final order of foreclosure may be made to the master in chambers or to any local officer having like jurisdiction. The applicant should produce an office copy of the judgment, an office copy of the report, if any, and there must be filed a certificate (*w*) of the cashier or other like officer of the bank to which the money is directed to be paid, showing non-payment of the money, duly verified by affidavit as well as an affidavit (*x*) by the person to be redeemed, showing non-payment of the money and non-receipt of rents, and negating his having been in possession, or in case he has been or is in possession, negating receipts other than those for which credit has been given in the account, or in case there has been a change in the account since the taking of the account, showing that rule 484 (*y*) has been complied with (*z*).

The final order is generally granted on an *ex parte* application, but in some cases notice of the motion will be required. Thus where it appeared by the report that a defendant had not received notice of the proceedings in the master's office, the case being one in which he was entitled to notice, notice of the motion was required to be served on him (*a*), and where

(*v*) See *Sadler v. Worley*, [1894] 2 Ch. 170, at p. 174; *Lees v. Fisher*, 1882, 22 Ch.D. 283.

(*w*) See *Bell & Hoyles*, Practice Forms, nos. 646, 647; *Holmested & Langton*, Forms and Precedents, 2nd ed., nos. 596, 597.

(*x*) See *Bell & Hoyles*, Practice Forms, nos. 637, 638, 639; *Holmested and Langton*, Forms and Precedents, 2nd ed., nos. 598, 599, 600.

(*y*) See §243, *supra*.

(*z*) *Holmested*, Ontario Judicature Act, 4th ed., 1078.

(*a*) *McCormick v. McCormick*, 1874, 6 O.P.R. 208.

there has been great delay in making the application notice may be required.

The final order for foreclosure may be refused where the mortgagor seeks an extension of time, and reasonable grounds are shewn therefor (*b*). This relief will, however, not be afforded as an indulgence to the mortgagor if there is no reasonable excuse for the default or where the security is insufficient (*c*).

Where the mortgagor was prevented from selling the property by reason of an improper advertisement published by the mortgagee's solicitors, six months further time was given, and costs were refused to the mortgagee (*d*). Where the mortgage was for purchase money and the vendor had failed to pay off a prior mortgage which he had covenanted to pay, and the defendant was prevented by the existence of the prior mortgage from raising money to pay off the second mortgage, the time was extended (*e*). On an application made before the day fixed for payment it was shown that the value of the mortgaged property would be greatly enhanced by the construction of a contemplated railway, and the time for redemption was extended for six months (*f*).

So long as the final order of foreclosure remains in force, it is a complete bar to the right to redeem; but the mortgagor may apply to set aside the order and to be allowed to redeem.

(*b*) *Collinson v. Jeffrey*, [1896] 1 Ch. 644.

(*c*) *Nanny v. Edwards*, 1827, 4 Russ. 124; *Jones v. Icke*, 1839, 9 Sim. 304; *Eyre v. Hanson*, 1840, 2 Beav. 478; *Patch v. Ward*, 1867, L.R. 3 Ch. 203, at p. 212; *Idington v. Trusts and Guarantee Co.*, 1917, 11 A.L.R. 337, 34 D.L.R. 86.

(*d*) *Gilmour v. Myers*, 1868, 2 Chy. Ch. (Ont.) 179.

(*e*) *G. v. V.* 1867, 2 Chy. Ch. (Ont.) 33.

(*f*) *Cameron v. Cameron*, 1869, 2 Chy. Ch. (Ont.) 375. See *Ford v. Steeples*, 1844, 1 U.C. Jur. pt. 1, 28; *Street v. O'Reilly*, 1868, 2 Chy. Ch. (Ont.) 270; *Cahuac v. Durie*, 1869, 2 Chy. Ch. (Ont.) 394.

In *Campbell v. Holyland* (*g*) Jessel, M.R. said:—

"The court made various orders—interim orders fixing a time for payment of the money—and at last there came the final order which was called foreclosure absolute, that is, in form, that the mortgagor should not be allowed to redeem at all; but it was form only, just as the original deed was form only; for the courts of equity soon decided that notwithstanding the form of that order they would after that order allow the mortgagor to redeem. That is although the order of foreclosure absolute appeared to be a final order of the court, it was not so, but the mortgagee still remained liable to be treated as mortgagee, and the mortgagor still retained a claim to be treated as mortgagor, subject to the discretion of the court. Therefore, everybody who took an order of foreclosure absolute knew that there was still a discretion in the court to allow the mortgagor to redeem."

Where third parties have not acquired rights to the property, and the mortgagee can be recompensed in money, the foreclosure may be opened and the time for redemption extended, but some reasonable excuse must be shown by the applicant for not having redeemed by the time fixed.

Where it was shown that the money was ready, but owing to illness and accident could not be paid at the exact time, this was held to be a sufficient ground (*h*). Relief was given in a case in which it was shown that the mortgagee had repeatedly stated, before and after the decree absolute, that he wanted the money not the property, and the mortgagor was under a reasonable belief that the mortgagee would extend the time for payment, and the value of the property considerably exceeded the mortgage debt (*i*). A foreclosure was opened eighteen months after the final order, where the mortgagor was illiterate, and had no solicitor in the cause, and misunderstood the object of the bill which was the only paper

(*g*) 1877, 7 Ch. D. 166, at p. 171.

(*h*) *Jones v. Creswicke*, 1839, 9 Sim. 304.

(*i*) *Thornhill v. Manning*, 1851, 1 Sim. N.S. 451; cf. *Trinity College v. Hill*, 1884, 10 O.A.R. 99; *Scottish American Investment Co. v. Brewer*, 1901, 2 O.L.R. 369.

served on him, the value of the property appearing to be three times the amount of the mortgage debt (*j*).

Where there has been actual, positive fraud, and not mere constructive fraud, on the part of the mortgagee, or where he has insisted on rights which upon due investigation are found to have been overstated, this relief may be afforded to the mortgagor (*k*).

Relief has been granted even as against a purchaser from the mortgagee after the final order of foreclosure, but there must be strong grounds for disturbing the purchaser. Thus, if the purchaser bought the lands within a short time after the final order was made and with notice of the fact that they were of much greater value than the mortgage debt, the foreclosure might be opened as against him, but the court would be disinclined to interfere with a person who purchased the lands many years after the date of the order and without notice of any circumstances which might lead to opening the foreclosure (*l*).

Where the decree directed foreclosure, and a final order was made dismissing the bill instead of foreclosing the plaintiff, and where, further, the report of the master allowed the plaintiff only six weeks to redeem, although the decree gave him six months, it was held that these were such irregularities as to give notice to the purchaser from the mortgagee that there was something unusual in the proceeding, and the mortgagor was allowed to redeem (*m*).

The mortgagor must make his application to open the foreclosure within a reasonable time. What is a reasonable time will depend upon the nature of the property (*n*).

(*j*) *Platt v. Ashbridge*, 1865, 12 Gr. 105; see *Ford v. Wastell*, 1847, 6 Hare 229.

(*k*) *Patch v. Ward*, 1867, L.R. 3 Ch. 203.

(*l*) *Campbell v. Holyland*, 1877, 7 Ch.D. 166.

(*m*) *Johnston v. Johnston*, 1882, 9 O.P.R. 259.

(*n*) *Campbell v. Holyland*, 1877, 7 Ch.D. 166.

The terms are in the discretion of the court. The mortgagor must satisfy the court that he will be able to redeem if further time is allowed, and he may be required to pay the interest and costs by an early date; or to pay the costs forthwith; or to give security for costs in the event of default (*o*).

The fact that the mortgagee has obtained a final order of foreclosure will not, as a general rule, preclude him from suing on the covenant provided that he is in a position to reconvey the mortgaged property. The mortgagor who is sued on the covenant acquires a new right to redeem, although he has parted with the equity of redemption, and is entitled to a reconveyance on payment of the debt (*p*). If the mortgagor offers to pay the mortgage, and if the mortgagee declines to receive the money, the court would restrain him from afterwards suing for the mortgage debt (*q*). If after a mortgagee has obtained a final order of foreclosure he has mortgaged the estate, that fact alone will not deprive him of the right to sue for the mortgage money, if at the time of bringing the action he has paid off the mortgage created by himself, and is in a position to reconvey the estate; neither does the fact of his having allowed the premises to fall into decay prevent him from so suing (*r*).

If a mortgagee obtains foreclosure before realizing on col-

(*o*) See *Trinity College v. Hill*, 1885, 8 O.R. 286; *Holford v. Yates*, 1855, 1 K. & J. 677; *Whitfield v. Roberts*, 1861, 7 Jur. N.S. 1268; *Howard v. Macara*, 1859, 1 U.C. Chy. Ch. 27.

(*p*) *Lockhart v. Hardy*, 1846, 9 Beav. 349, 18 R.C. 434; *Palmer v. Hendrie*, 1859, 27 Beav. 319; *Kinnaird v. Trollope*, 39 Ch.D. 636; *Bank of Toronto v. Irwin*, 1881, 28 Gr. 397; *Chatfield v. Cunningham*, 1892, 23 O.R. 153. See also chapter 23, *Action on the Covenant*, §227, as to the principle that the mortgagee is not entitled to enforce the covenant for payment unless he is in a position to restore the mortgaged property.

(*q*) *Munsen v. Hauss*, 1875, 22 Gr. 279.

(*r*) *Munsen v. Hauss*, *supra*.

lateral securities he thereby deprives himself of the benefit of such securities (s).

§245. *Action or judgment for sale.*

In England prior to the Chancery Improvement Act, 1852, the court might decree sale instead of foreclosure in certain cases, as in the case of a mortgage of a dry reversion, or if the security were scanty, or if the bill, praying sale, were taken *pro confesso*. In the case of an infant heir or devisee of the mortgagor, there would have been, with the mortgagee's consent, an enquiry whether a sale or foreclosure would be more beneficial for the infant, and if it appeared clearly that a sale would be for the benefit of the infant, sale would be decreed (t). Further jurisdiction to direct a sale instead of foreclosure in a foreclosure action was given to the court by s. 48 of the Chancery Improvement Act, 1852 (u), but this section was repealed and larger powers were conferred upon the court by the Conveyancing Act, 1881.

Under the present practice a mortgagee is usually entitled to judgment or sale at his option (v). He may now combine in one action his claims for foreclosure or sale of the mortgaged property and for payment of the mortgage debt by any party personally liable therefor and for possession of the mortgaged property (w).

(s) *Dyson v. Morris*, 1842, 1 Hare 413.

(t) See the notes to *Thornbrough v. Baker* in 2 W. & T.L.C. Eq. at pp. 62, 63, as to the statements in the text and as to the present English practice. Cf. as to the early practice in Upper Canada, *Meyers v. Harrison*, 1850, 1 Gr. 449, at p. 455.

(u) 15 & 16 V. c. 86, s. 48, adopted in Upper Canada in the general orders in Chancery of 1853. The power thus given to the Court of Chancery in Upper Canada has been superseded by the larger powers conferred by the present rules hereinafter referred to.

(v) For the exceptional cases in which the mortgagee is confined to one of these remedies, see §231, *supra*.

(w) See §232, *supra*.

In Ontario the form of endorsement of a writ of summons embodying the claims for sale, payment and possession is as follows (x):

The plaintiff's claim is on a mortgage dated the _____ day of _____ made between _____ [or by deposit of title deeds], and that the mortgage may be enforced by sale, [where desired add and payment to the plaintiff by the defendant personally of any balance]

If immediate payment is desired add, And to recover from you the defendant (naming the defendant against whom the relief is claimed) payment of the amount due under a covenant by [you] in that behalf contained in said mortgage (or as the case may be).

(If immediate possession is desired add), And to recover immediate possession of the mortgaged premises

And take notice that the plaintiff claims that there is now due by you for principal money the sum of \$ _____ [If so add and for taxes (or premiums of insurance or other matters) the sum of \$ _____] and for interest the sum of \$ _____ and that you are liable to be charged with these sums with subsequent interest to be computed at the rate of _____ per centum per annum and costs in and by the judgment to be drawn up, and that in default of payment thereof within six calendar months from the time of drawing up the judgment your interest in the property may be sold, unless before the time allowed you for appearance you file in the office within named a memorandum in writing entitled in this action and signed by yourself or your solicitor to the following effect: "I dispute the amount claimed by the plaintiff in this action," in which case you will be entitled to four days' notice of the taking of the account of the amount due to the plaintiff.

The following is a description of the mortgaged premises: (*Set out description sufficient for registration*).

Not only may sale be decreed in an action for sale, but in a foreclosure action judgment may be entered for sale at the instance either of a defendant by writ or of a defendant added in the master's office.

It is provided in Ontario by rules 461 and 462 as follows:

461. Where a defendant by writ in an action for foreclosure desires a sale, but does not otherwise desire to defend the action, he shall, within the time allowed for appearance, file and serve a mem-

(x) As to the "special endorsement" of the writ of summons in Ontario, see §252, *supra*.

orandum, entitled in the action, to the following effect: "I desire a sale of the mortgaged premises instead of foreclosure," and shall pay into court the sum of \$80 to meet the expenses of the sale, and thereupon the judgment shall be entered for sale.

462. A person made a party in the master's office and desiring a sale shall make a similar deposit before the master's report is settled, and obtain an order which may be issued on *præcipe* directing sale instead of foreclosure, and thereupon all subsequent proceedings shall be had and taken as if the judgment had been in the first instance for sale.

A larger deposit than \$80 cannot be ordered (y), but it is provided by rule 464 as follows:

464.—(1) If the plaintiff prefers that the sale be conducted by any adult defendant desiring the sale, he may so elect, and he shall thereupon notify the defendant of such election and the defendant making the deposit shall be entitled to a return thereof.

(2) In other cases the master shall deal with the deposit in making his report.

The former practice in Ontario was that if an infant was defendant in a foreclosure action an order of reference would be made to determine whether foreclosure or sale would be more to his advantage and if it were found that a sale would be more advantageous a sale would be directed without requiring any deposit (z).

It is now provided by rule 463 as follows:

463. Where there are infant defendants the official guardian may require the judgment to be for sale without making any deposit.

In a foreclosure action the plaintiff is usually entitled to judgment for foreclosure unless a defendant by writ or added

(y) *Cruzeo v. Close*, 1879, 8 O.P.R. 33; see, however, *London and Canadian Loan and Agency Co. v. Morrison*, 1879, 7 O.P.R. 450, where under a former rule the opinion was expressed that an order increasing the amount required as a deposit might be made before the order for sale was acted upon.

(z) *Lawrason v. Fitzgerald*, 1862, 9 Gr. 371. Where it appeared from the evidence taken before the master that a sale would not realize the amount of the plaintiff's claim, foreclosure was decreed. *Landed Banking & Loan Co. v. Anderson*, 1886, 3 M.R. 270.

in the master's order asks for sale and (except in the case of an infant defendant) makes a deposit for the costs of the sale (a).

It is also provided by rule 465 as follows (b):

465. The court may on special application either before or after judgment direct a sale instead of a foreclosure; and without previously determining the priorities of encumbrancers, or giving the usual or any time to redeem.

The object of the provision as to ordering a sale without determining priorities is to cover the case of one mortgagee having an admitted priority, and his claim being probably large enough to absorb the whole price realised, in which case there will be no necessity to determine the priorities between the other mortgagees (c).

If a subsequent mortgagee brings an action and makes a prior mortgagee a party, the former will be limited to his right to redeem the latter. Usually the prior mortgagee will not be a party at all and will not be affected by the proceedings, and a sale in the action will take effect subject to his mortgage (d). The subsequent mortgagee can act as plaintiff, not seeking to redeem, have a sale as against the prior

(a) *Canada Life Assurance Co. v. Vance*, 1909, 2 S.L.R. 398; cf. *Excelsior Life v. Prestniak*, 1908, 1 S.L.R. 215; *McGee v. Holstreet*, 1912, 5 D.L.R. 391 (Sask.).

(b) Under the English Conveyancing Act, 1881, s. 25, which enlarged the power of the court to order a sale under the now repealed provision of the Chancery Improvement Act, 1852, it has been held that the court may in a foreclosure action order a sale at any time before the foreclosure has become absolute. *Union Bank of London v. Ingram*, 1882, 20 Ch.D. 463. It has also been held that the court has no power to make an order for sale after a decree for foreclosure except by the consent of all parties interested, and that the decree could be varied only on a rehearing. *Credit Foncier Franco-Canadien v. Scott*, 1894, 19 M.R. 158.

(c) *Strahan, Law of Mortgages*, 2nd ed. 1911, p. 111.

(d) See §234, *supra*.

The case of a judgment for foreclosure, judgment for sale may be without a reference, if there are no subsequent encumbrances or with a reference, if there are subsequent encumbrances.

reference, a final order of sale may be
 voided by rule 478 as follows:

(c) *Campbell v. McDougall*, 1880, 5 O.A.R. 503, S.C. sub nom. *McDougall v. Campbell*, 1881, 6 Can. S.C.R. 502; *Wallace v. Smith*, 1912, 1 M.R. 68, 1 D.L.R. 70.

See §§237 ff., *supra*. For form of report under a judgment
see Holmsted & Langton, Forms and Precedents, 2nd ed.

(11) As to the application for the order, cf. §244, *supra*, as to a final order of foreclosure.

but in special circumstances judgment for immediate sale without giving a day for redemption may be granted without the consent of the mortgagor (*i*), or without the consent of the subsequent encumbrancers (*j*). That the property is wholly unproductive (*k*), that the interest has been in arrears for many years (*l*), that the mortgaged estate is insufficient to realize the claim and is deteriorating (*m*), that for a special reason, for instance the building of railway in the vicinity of the lands, a favourable sale can be made (*n*), are special circumstances that will be considered by the court on an application for immediate sale.

It is provided in Ontario by rules 438 ff. as follows:

438. Where a sale is ordered, the master may cause the property to be sold either by public auction, private contract, or tender, or part by one mode and part by another, as he may think best for the interest of all parties.

439. The party having the conduct of the sale shall bring into the master's office a draft advertisement (*o*), which shall shew:

- (a) The short style of cause;
- (b) That the sale is in pursuance of an order of the court;
- (c) The time and place of sale;
- (d) A short and true description of the property to be sold;
- (e) The manner in which the property is to be sold, whether in one lot or several, and if in several, in how many, and what lots;
- (f) What proportion of the purchase money is to be paid down by way of deposit, and at what time or times, and whether the residue of such purchase money is to be paid with or without interest;
- (g) If there is an upset price or reserve bid it shall be so stated;

- (i) *Foster v. Harvey*, 1863, 4 DeG. J. & S. 59.
- (j) *Township of Hamilton v. Stevenson*, 1877, 25 Gr. 198; *Newman v. Selfe*, 1864, 33 Beav. 522.
- (k) *Foster v. Harvey*, *supra*.
- (l) *Newman v. Selfe*, *supra*.
- (m) *Rigney v. Fuller*, 1853, 4 Gr. 198.
- (n) *Swift v. Minter*, 1879, 27 Gr. 217.
- (o) For form of advertisement, see Bell & Hoyles, *Practice Forms*, no. 674; *Holmsted & Langton*, 2nd ed., no. 1035.

(h) Any particulars in which the proposed conditions of sale differ from the standing conditions.

440. Upon the return of the appointment to settle the advertisement the master shall also fix the time and place of sale, name an auctioneer, where one is to be employed, give direction for publication, fix the upset price or reserve bid, and make every other necessary arrangement preparatory to the sale.

441. The standing conditions of sale shall be those set forth in form no. 52.

Form no. 52 is as follows:

Standing Conditions of Sale.

1. No person shall advance less than \$10 at any bidding under \$500, nor less than \$20 at any bidding over \$500, and no person shall retract his bidding.

2. The highest bidder shall be the purchaser; and if any dispute arise as to the last or highest bidder, the property shall be put up at a former bidding.

3. The parties to the action, with the exception of the vendor, (and, naming any parties, trustees, agents, or others, in a fiduciary situation), shall be at liberty to bid.

4. The purchaser shall, at the time of sale, pay down a deposit, in proportion of \$10 for every \$100 of the purchase money, to the vendor, or his solicitor; and shall pay the remainder of the purchase money, on the day of next; and upon such payment, the purchaser shall be entitled to the conveyance, and to be let into possession; the purchaser at the time of sale to sign an agreement for the completion of the purchase.

5. The purchaser shall have the conveyance prepared at his own expense, and tender the same for execution.

6. If the purchaser fails to comply with the conditions aforesaid, or any of them, the deposit and all other payments made thereon, shall be forfeited, and the premises may be resold; and the deficiency, if any, by such re-sale, together with all charges attending the same, or occasioned by the defaulter, are to be made good by the defaulter.

442. All parties may bid, except the party having the conduct of the sale, and except any trustees, agents, and other persons in a fiduciary position.

443. The master or his clerk shall conduct the sale where no auctioneer is employed.

444. The purchaser shall at the time of sale sign an agreement to purchase.

445. The deposit shall be paid to the vendor, or his solicitor, at the time of sale, and shall forthwith be paid by him into court, in the name of the purchaser.

446. After the sale is concluded, the auctioneer, where one is employed, shall make an affidavit as to the result of the sale and where no auctioneer is employed, the master or his clerk shall certify the result (p).

Form no. 53 is as follows:

Report on Sale.

Pursuant to the judgment, bearing date the day of , and made in this cause, I have, in the presence of (or, after notice to), all parties concerned, settled an advertisement and particulars and conditions of sale, for the sale of the lands mentioned or referred to in the said judgment (or order), and such advertisement having, according to my directions been published in the (naming the newspaper or newspapers), once in each week for the weeks immediately preceding the said sale (or as the case may be), and bills of the said sale having been also, as directed by me, published in different parts of the township (town or city) of and the adjacent county and villages (or as the case may be), the said lands were offered for sale by public auction, according to my appointment, on the day of , by me (or by Mr. of , appointed by me for that purpose, auctioneer), and such sale was conducted in a fair, open and proper manner, when of was declared the highest bidder for, and became the purchaser of the same, at the price or sum of \$, payable as follows (set out shortly the conditions of sale as to payment of the purchase money).

All which having been proved to my satisfaction by proper and sufficient evidence, I humbly certify.

447. Objection to the sale shall be by motion to set aside the same; and notice of the motion shall be served upon the purchaser, and on the other parties and biddings shall be opened only on special grounds.

448. The purchaser may pay his purchase money, or the balance thereof, into court without further order; and after confirmation of the report on sale, upon notice to the party having the conduct of the sale, he may if he so desires obtain a vesting order; and when he is entitled to be let into possession, if possession is wrongfully withheld from him, an order against any party in possession

(p) For form of affidavit of auctioneer, see Bell and Hoyles, Practice Forms, no. 677; Holmsted & Langton, Forms and Precedents, 2nd ed., no. 1048.

for the delivery thereof to him may be made upon his application or upon the application of the vendor.

A report on sale, though only a report that there was no sale for want of bidders, is a report that may be appealed from and requires confirmation. And an order made by a local judge confirming such a report, while it was neither confirmed under rule 502 nor appealed from, and granting foreclosure in default of payment, was held to be bad (*q*).

Provision is also made by rule 478, already quoted, for payment of the purchase money into court to the credit of the action, and rule 479 provides:

479. The purchase money, when so paid, shall be applied and paid out of court in payment of what has been found due to the plaintiff and the other encumbrancers (if any), according to their priorities, together with subsequent interest, and subsequent costs.

If a purchaser, instead of paying the money into court, chooses to pay it to the encumbrancers, he does so at his own risk as to the claims of other persons, as, for instance, a claim to never payable out of the surplus (*r*).

If the mortgagor makes the deposit for the purpose of having a sale instead of foreclosure, and the proceeds of the sale are more than sufficient to pay the plaintiff but are insufficient to pay the subsequent encumbrancers, the mortgagor is not entitled to a return of the deposit but it must be applied in reduction of the second mortgagee's claim (*s*).

Certain lands were sold under decree in an action upon a mortgage for an amount in excess of that due under the first mortgage. No mention was made in the decree or at the sale of any claims to which the sale would be subject, but it subsequently transpired that there was a large amount due for unpaid taxes. On a motion to distribute the money in court, the

(*q*) *Robert v. Caughell*, 1903, 6 O.L.R. 381.

(*r*) *Hyde v. Barton*, 1880, 8 O.P.R. 205.

(*s*) *Gzowski v. Beatty*, 1879, 8 O.P.R. 146.

purchaser claimed that the amount of these taxes should be paid out of the fund in court. It was held that under the Land Titles Act a purchaser takes title subject to unpaid taxes, and the sale therefore was subject to any amount due for taxes, and the purchaser was not entitled to be reimbursed in respect thereof (*l*).

It is provided by rule 483 as follows:

183. If the purchase money is not sufficient to pay what has been found due to the mortgagee (where the mortgagor or person liable to pay the debt is a defendant), he shall be entitled on an *ex parte* application, to an order for the payment of the deficiency.

Under this rule the plaintiff may obtain an order for payment of the deficiency by any defendant who is personally liable to pay (*u*), and may avail himself of the rule in order to obtain payment of the costs of the reference and sale and interest since the judgment at the contract rate (*v*). In other respects an order under this rule is unnecessary if the judgment contains, as is usually the case, an order for personal payment by any defendant who is personally liable.

Where a sale has been attempted and has proved abortive an order may be made in chambers for foreclosure. Formerly it seems that the mortgagor was usually allowed three months further time for redemption, but it has been held that the time is subject to the discretion of the court in view of all the circumstances of the case (*w*). Perhaps now by analogy to rule 489, one month will be the time allowed in every case (*x*).

Where a person having the conduct of a sale under an order for sale had been found to be a trustee, with a lien for-

(*l*) *Canada Permanent Mortgage Corporation v. Martin*, 1909, 2 S.L.R. 472.

(*u*) See chapter 23, *Action on the Covenant*, §221.

(*v*) Assuming that the mortgage provides for payment of interest at the contract rate after default. See chapter 29, *Interest*, §313.

(*w*) *Scarlett v. Birney*, 1893, 15 O.P.R. 283, and cases there cited.

(*x*) *Holmsted*, Ontario Judicature Act, 4th ed., 1032.

advances, it was held that his position as a trustee debarred him from the ordinary remedy of foreclosure which a mortgagee is entitled to after an abortive sale, but that after a sale by auction had been tried in vain the trustee was at liberty to make an offer on his own behalf, and that the court might in its discretion allow him to purchase (y).

A mortgagee instituted foreclosure proceedings under a mortgage, and on the application of one of the defendants an order for sale was made with leave to the plaintiff to bid. No one appeared to bid at the sale save the plaintiff's agent, who bid twenty-five cents, and the land was knocked down to the plaintiff for that sum. On an application to confirm the sale, the judge before whom the application was made refused to confirm. On appeal, it was held that having regard to the nature of the property, the amount bid and for which the land was knocked down was so puerile that the court was warranted in treating it as no sale, and refusing confirmation. It was also held, however, that no substantial bid having been made, the sale should be treated as abortive, and an order for foreclosure made (z).

A motion by the plaintiff in a mortgage action for an order for a new day and a new account, and to change the relief sought from sale to foreclosure, was opposed by the defendant upon the ground of a settlement or compromise after judgment, under which money had been paid to the plaintiff, the mortgagee. It was held that if the defendant mortgagor had made default in payments according to the agreement, the unmodified burden of the mortgage existed and was enforceable. Such an arrangement should be investigated in the master's office, and not by independent litigation. The matter

(y) *Hutton v. Justin*, 1901, 2 O.L.R. 713, following *Tennant v. Trenchard*, 1869, L.R. 4 Ch. 537, at p. 546.

(z) *Canada Permanent Mortgage Corporation v. Jesse*, 1909, 2 S.L.R. 251.

had passed into judgment, and the only contest was as to how much was due and payable in respect of the mortgage, having regard to the arrangement manifested in the correspondence and dealings subsequent to the master's report. It is foreign to the policy of the Judicature Act to contemplate new litigation in such a case as this (a).

§246. *Foreclosure and sale under the Land Titles Acts.*

In Ontario it is provided by the Land Titles Act, R.S.O. 1914, c. 126, s. 34, as follows:

34. Subject to any entry to the contrary on the register the registered owner of a registered charge may enforce it by foreclosure or sale (b) in the same manner and under the same circumstances in and under which he might enforce the same if the land had been transferred to him by way of mortgage, subject to a proviso for redemption.

Under this section the procedure for obtaining foreclosure or sale in the case of a charge under the Land Titles Act is the ordinary procedure discussed in the foregoing portions of this chapter. It is to be observed, however, that in the case of a conveyance of the legal estate by way of mortgage in the old form, the mortgagee, after foreclosure, retains the legal estate discharged from the mortgagor's equity of redemption. On the other hand as a chargee under a statutory charge has not the legal estate but merely a lien upon the land, he does not obtain the legal estate by the final order of foreclosure, though he may subsequently become absolutely entitled to the land by getting himself registered as the proprietor (c). It is provided by land titles rule 27 as follows:

(a) *McCollum v. Caston*, 1901, 1 O.L.R. 240

(b) The word "sale" in this section refers to sale under the direction of the court in an action. Sale under the power of sale is provided for by s. 35. See chapter 31, *Sale under Power of Sale* §345.

(c) Cf. *Williams, Real Property*, 21st ed., pp. 675, 654

27.—(4) In the event of a foreclosure or sale being enforced by the registered owner of the charge, the master of titles shall upon the application of the person entitled to the benefit of the foreclosure or sale, and on proper proof, make all necessary entries in the register. The applicant is to leave with the master a draft of the entry which he considers himself entitled to.

In Manitoba there are two systems of land registration—registration of deeds under the Registry Act and registration of titles under the Real Property Act, designated as the old system and the new system respectively (*d*). In the case of land under the old system the procedure in actions for foreclosure or sale is very similar to that prevailing in Ontario (*e*), but in the case of lands under the new system a special statutory procedure is provided for sale and for foreclosure, and there is no statutory provision expressly authorizing recourse to be had in the alternative to the courts for foreclosure or sale. Whether, in the absence of express provision, the courts have jurisdiction to entertain actions for foreclosure or sale in respect of land under the new system is a question about which there has been difference of opinion and to understand which it is necessary to have regard to the course of legislation in Manitoba.

The land titles system was introduced in Manitoba by the Real Property Act of 1885 (*f*) which, as regards mortgages, was substantially the same as the statute then in force in Victoria, with an important exception to be noted later. This statute contained provisions authorizing sale by the mortgagee, these provisions being somewhat similar to ss. 118 and 119 of the present statute (*g*) except that the proceedings were not subject to the supervision or direction of the registrar.

(*d*) See chapter 10, *Land Titles Acts*, §91.

(*e*) See *Williams, King's Bench Act*.

(*f*) As to the history of the Manitoba legislation, see *Smith v. National Trust Co.*, 1912, 45 Can. S.C.R. 618, 1 D.L.R. 698; *Williams v. Box*, 1910, 44 Can. S.C.R. 1; *Thom, The Canadian Torrens System*, pp. 310 ff., 317, and appendix H.

(*g*) Real Property Act, R.S.M. 1913, c. 171.

In 1889 foreclosure after abortive sale was authorized by provisions substantially similar to s. 122 of the present statute.

In 1892 a statute was passed requiring in effect that the manner in which a sale should be conducted as well as the conditions of sale should be determined by the registrar.

In 1900 the statute was revised and put substantially in its present form, and it was enacted that the mortgagee might, after default and the giving of notice in accordance with the statute, sell in such manner as the registrar might direct and subject to such conditions as the registrar might think fit (*h*).

Other important changes were made by the statute of 1900. A section corresponding to s. 116 of the present statute (*i*) was inserted, providing in effect that every first mortgagee should have the same rights and remedies as if the legal estate had been vested in him subject to a proviso for quiet enjoyment by the mortgagor until default. A similar section was contained in the Victorian statute which served as a model for the Manitoba Statute of 1885, but it had been omitted from the latter statute.

Prior to 1906 there was no express reference in the statute to an action for foreclosure or sale, as distinguished from sale and foreclosure in the land titles office, but there was a provision (*j*) that "nothing in this Act shall take away or affect the jurisdiction of any competent court on the ground of fraud, or over contracts for the sale or other disposition of land or over equitable interests therein." In the year mentioned the provision just quoted was amended by the addition

(*h*) For a comparison between the provisions of the Manitoba Saskatchewan and Alberta statutes as to sale proceedings in registrar's office, see §247, *infra*. The question whether a mortgagor may validly stipulate for a contractual power of sale is discussed in chapter 31, *see under Power of Sale*, §345.

(*i*) This section is quoted in full in chapter 10, §99.

(*j*) R.S.M. 1902, c. 148, s. 126.

of the words "or over mortgages, nor shall anything contained in this Act affect the right of the mortgagee to foreclose or sell through any competent Court, which right it is hereby declared may be exercised in such Court," and the predecessor of s. 116 of the present statute was amended by specifying among the rights and remedies of a first mortgagee "the right to sell or foreclose through any competent Court."

Under the statute as amended in 1906 it was held that the court had jurisdiction in Manitoba to open up foreclosure proceedings taken in the land titles office, notwithstanding the issue of a certificate of title, in the same manner and upon the same grounds as in the case of mortgages under the old system, at all events where the rights of a purchaser in good faith and for value had not intervened (*k*). The amendments of 1906 were, however, repealed in 1911, and in accordance with the principle that a mortgagee under the land titles system has only such rights and remedies as the statute expressly or impliedly gives him (*l*), the correct view would seem to be that a mortgagee under the new system in Manitoba has no right to resort to the court for foreclosure or sale but is confined to his statutory remedies by way of sale or foreclosure in the land titles office (*m*).

The Land Titles Acts in force in Saskatchewan, Alberta and the Northwest Territories differ from the Real Property Act of Manitoba in that the former all contain provisions expressly conferring jurisdiction upon the courts to entertain

(*k*) *Williams v. Box*, 1910, 44 Can. S.C.R. 1, reversing 19 M.R. 560.

(*l*) Cf. *Smith v. National Trust Co.*, 1912, 45 Can. S.C.R. 618, at p. 644, 1 D.L.R. 698, at p. 714. See also the passages quoted in chapter 10, §99, *supra*.

(*m*) See the judgments in the Court of Appeal for Manitoba in *Williams v. Box*, *supra*; cf. *Thom, The Canadian Torrens System*, pp. 310 ff., 345; *Scott, Torrens Title Mortgages*, pp. 101-4; *Re Alarie and Frechette*, 1913, 23 M.R. 628, 14 D.L.R. 298.

actions for foreclosure or sale, but in other respects the statutes of Saskatchewan and Alberta present many points of similarity with the Manitoba statute as regards the remedies of the mortgagee by proceedings in the land titles office.

The land titles system was introduced in the Northwest Territories (including the present provinces of Saskatchewan and Alberta) by a dominion statute of 1886 (*n*). Under this statute a mortgagee had a power of sale which might be exercised without the supervision or direction of the registrar or a judge, and after abortive sale foreclosure might be obtained on application to a judge.

By the Land Titles Act, 1894, a new principle was introduced. A power of sale was, as before, conferred upon the mortgagee, but the proceedings were made subject to the supervision of a judge. A sale could be made only upon the direction of a judge and subject to the conditions which he might impose, and a transfer to the purchaser could be registered only after confirmation of the sale by a judge. Foreclosure could be obtained after an abortive sale upon application to a judge.

In 1898 the existing statutory provisions for sale and for foreclosure were repealed and s. 75 of the statute of 1894 was replaced by the following new section, which was still in force when the provinces of Saskatchewan and Alberta were in 1905 separated from the Northwest Territories (*o*):

75. Proceedings to enforce payment of moneys secured by mortgage or encumbrance, or to enforce the observance of the covenants,

(*n*) As to the history of the subsequent legislation, see *Re Sun Life Assurance Co.* and *Widmer*, 1916, 26 D.L.R. 147; *Douglas v. Mutual Life Assurance Co.*, 1918, 13 A.L.R. 18, 38 D.L.R. 459, 39 D.L.R. 601, reversed by the Supreme Court of Canada, 8 Oct. 1918, *sub nom.* *Mutual Life Assurance Co. v. Douglas*; *Thom, The Canadian Torrens System*, pp. 306, 312, 317, and appendix H; *Scott, Torrens Title Mortgages*, pp. 67 ff.

(*o*) The provision in question was continued in the Land Titles Act enacted in 1906 in each of the new provinces

agreements, stipulations or conditions contained in any mortgage or encumbrance, or for the sale of the lands mortgaged or encumbered, or to foreclose the estate, interest or claim of any person in or upon the land mortgaged or encumbered, as also proceedings to redeem or discharge any land from any such mortgage or encumbrance, shall be had and taken in the Supreme Court of the Northwest Territories, under the practice and procedure of the said court.

Under the present Land Titles Act of the Territories the corresponding section provides that the proceedings "shall be had and taken in the Northwest Territories before a stipendiary magistrate and in the Yukon Territory in the Territorial Court" (p), and there is no provision in the statute for foreclosure or sale proceedings in the land titles office or under the supervision of the registrar.

In Saskatchewan, however, in the legislative session of 1908-9 new sections were enacted, substantially similar to the sections which were repealed in 1898, providing for sale and foreclosure, such proceedings, however, to be subject to the supervision and direction of the registrar instead of a judge. The section directing that proceedings to enforce payment, etc., and for sale or foreclosure, should be had and taken in court was also amended by substituting the word "may" for the word "shall," and it is now provided by the Land Titles Act, 1917, s. 107, as follows (q):

107. Proceedings to enforce payment of moneys secured by mortgage or encumbrance, or to enforce the observance of the covenants, agreements, stipulations or conditions contained in a mortgage or encumbrance, or for sale of the lands mortgaged or encumbered or to foreclose any estate, interest or claim in or upon the lands mortgaged or encumbered or to redeem or discharge land from a mortgage, may be had and taken in the Supreme Court of Saskatchewan.

A mortgagee may therefore take proceedings for sale or foreclose either in the supreme court according to the practice

(p) R.S.C. 1906, c. 110, s. 99

(q) 1917 (2nd sess.) c. 118.

and procedure of that court or in the land titles office under supervision of the registrar.

In Alberta until 1914 no change was made in the statute as regards foreclosure or sale proceedings, and such proceedings continued to be governed by the general provision by which a mortgagee was obliged to have recourse to the court for these remedies. The Foreclosure or Sale Act of 1914 authorized proceedings to be taken before a master in chambers but in 1915 this statute was replaced by new provisions of the Land Titles Act authorizing proceedings for sale and foreclosure to be taken in the land titles office under the supervision of the registrar (*s*).

The Alberta statute, s. 62, contains a provision similar to s. 107 of the Saskatchewan statute (*t*), with the following additional clauses:

Provided, however, that where proceedings in respect of any mortgage or encumbrance have already been or hereafter shall have been commenced under the provisions of the next following section (*u*), no proceedings under this section for the enforcement of the covenant for payment shall be commenced or if commenced shall be continued until the remedies provided by the next following section are exhausted (*r*).

(2) Where any action or proceeding has before the date of the passing of this subsection been taken or shall thereafter be taken in any court either under the provisions of this section or to enforce the observance of the covenants, agreements, stipulations or conditions contained in any agreement for the sale of any land, and personal judgment has been or shall be obtained therein, no execution shall issue thereon until sale of the land mortgaged or encumbered or agreed to be sold has been had or foreclosure ordered and levy shall then be made only for the amount of the judgment or mort-

(*r*) *Wasson v. Harker*, 1912, 5 S.L.R. 364, 8 D.L.R. 88.

(*s*) The substantially similar provisions of the Manitoba, Saskatchewan and Alberta statutes are discussed in §§247, 248, *infra*.

(*t*) The word "may" (as in the Saskatchewan statute) having been substituted for the word "shall" by 1915, c. 3, s. 1.

(*u*) I.e. s. 62a, hereinafter referred to.

(*v*) Added by 1916, c. 3, s. 15.

gage debt remaining unsatisfied with costs (w), and no execution shall issue and no proceedings shall be had or taken in respect of any execution already issued on any personal judgment obtained either before or after the passing of this subsection, under the covenants, agreements or conditions contained in any mortgage, encumbrance or agreement for the sale of land or any foreign judgment obtained in respect thereof whether the land described in such mortgage, encumbrance or agreement for sale has its situs within the Province of Alberta or else where, until sale of the land mortgaged or encumbered or agreed to be sold has been had or foreclosure ordered in some competent jurisdiction and levy shall then be made only for the amount of the judgment or mortgage debt remaining unsatisfied with costs (x).

Inasmuch as a mortgage under the land titles system does not convey the legal estate, but merely creates a charge on the mortgaged land (y), and the effect of foreclosure in equity is simply to deprive the mortgagor of his equitable right to redeem and thus free the mortgagee's legal estate from the equitable claim (z), the word "foreclosure" is not entirely appropriate to proceedings under the land titles system. In the case of foreclosure by proceedings in the registrar's office it is expressly provided in the Manitoba, Saskatchewan and Alberta statutes that an order of foreclosure under the hand of the registrar shall have the effect of vesting the land in the mortgagee free from all rights or equity of redemption (a) but in the case of foreclosure by order of a court in Saskatchewan, Alberta or the Northwest Territories, the mortgagee should see that there is inserted in the order a clause either vesting the land in the mortgagee (b) or directing the mortgagor to transfer the land to the mortgagee (c).

(w) Added by 1916, c. 3, s. 15. See *Lincham v. McNeill*, 1916, 10 A.L.R. 272, 31 D.L.R. 768; *Werthe v. Davie*, 1916, 11 A.L.R. 46, 32 D.L.R. 384.

(x) Added by 1917, c. 3, s. 40.

(y) See chapter 10, *The Land Titles Acts*, &c.

(z) See chapter 3, *Legal Mortgage in Equity*, §22.

(a) See §218, *infra*.

(b) *Colonial Investment and Loan Co. v. King*, 1902, 5 N.W.T. L.R. 371.

(c) Such a clause is necessary in the case of the foreclosure of

A foreclosure under the Land Titles Acts will not be reopened after the registration of a transfer to a purchaser in good faith from the mortgagee (*d*). It has also been held that where property has been sold under the statutory power of sale to a purchaser in good faith it is too late for the mortgagor to apply for leave to redeem even though the purchaser has made default in strict compliance with the agreement for sale (*e*).

§247. *Sale proceedings in the registrar's office.*

The Manitoba, Saskatchewan and Alberta statutes (*f*) contain substantially similar provisions for sale and foreclosure in the land titles office under the direction of the registrar. For the purpose of comparison the relevant provisions of the Saskatchewan statute are quoted *verbatim*.

S. 108 of the Saskatchewan statute (*g*) provides that after default under a mortgage for one calendar month or for such longer time as may be expressly limited for the purpose, and subject to the other requirements of the section, a mortgagee may enter into possession of the lands and make leases. Previous notice in writing must be registered and served upon persons appearing to have subsequent mortgages, encumbrances or liens.

any equitable mortgage if it is desired to vest the legal estate in the mortgagee. See §244, *supra*

(*d*) *Richards v. Thompson*, 1911, 4 S.L.R. 212.

(*e*) *Saltman v. McGill*, 1910, 19 M.R. 456

(*f*) The references are to the Real Property Act, being R.S.M. 1912, c. 171, the Land Titles Act, 1917, being Sask. statutes, 1917 (2nd sess.) c. 18, and the Land Titles Act, being Alta. statutes, 1906, c. 24

(*g*) Quoted in chapter 22, *Action for Possession*, §217, with references to the corresponding provisions in Manitoba (s. 118) and Alberta (subs. 1, 2, 3, 4, 5 of s. 62a, as enacted by 1915, c. 3, s. 2). The sections in question refer also to an encumbrance and an "encumbrance." As to the latter word see the next following note. As to the definition of an encumbrance see chapter 10, *The Land Titles Act*, §93.

It is also provided by this section and by the corresponding provision in the Manitoba statute that the mortgagee may by such notice require payment or observance of the covenants, within a time specified in the notice and notify the persons entitled "that all remedies competent will be enforced unless such default be remedied." Under the Alberta statute the notice "shall contain a statement that in case default continues for the further space of two calendar months from the date of service of the notice, the mortgaged lands may be sold under the provisions of *The Land Titles Act*," and "may also declare the intention of the mortgagee or encumbrancee (*h*) to make an application for foreclosure as hereinafter provided in case a sale of the lands by public auction shall prove abortive, and in case default in payment of the principal or interest secured by the mortgage or encumbrance shall be continued for six months after the time for payment mentioned in the mortgage or encumbrance."

The Saskatchewan statute, s. 109, is as follows:

109. Upon such default in payment or in the observance of any covenant continuing for the further space of two calendar months from the date of service of such notice, the mortgagee or encumbrancee may, pursuant to any power of sale contained in the mortgage or encumbrance, sell the land or any part thereof and all the estate and interest therein of the mortgagor or encumbrancer and of the other interested parties referred to in the last preceding section, at such time and in such manner as the registrar may direct, and either altogether or in lots, by public or private contract or by such modes of sale and subject to such terms and conditions as to expenses or otherwise as the registrar may think fit.

(*h*) In ordinary parlance an "encumbrancer" means a person who holds an encumbrance and in §§231 to 245, *supra*, the word is used with this meaning, but in the Real Property Act of Manitoba and in the Land Titles Acts of Saskatchewan and Alberta the English language is tampered with to the extent that an "encumbrancer" is defined as meaning the owner of land subject to an encumbrance and the word "encumbrancee" is coined for the occasion and is defined as meaning the owner of an encumbrance.

The Manitoba and Alberta statutes (*i*) omit the words "pursuant to any power of sale contained in the mortgage or encumbrance." Whereas in Manitoba and Alberta a mortgagee may exercise the statutory power of sale whether the mortgage contains an express power of sale or not, in Saskatchewan it would seem that if the mortgage contains no express power of sale the mortgagee is not entitled to exercise the statutory power of sale, and consequently is not entitled to avail himself of the provisions for foreclosure in the registrar's office (*j*), but is obliged to resort to the court for foreclosure or sale under the provisions of s. 107 (*k*). The value of an express power of sale in Saskatchewan would seem to consist merely in the fact that its existence renders available to the mortgagee the statutory power of sale. It would appear to be useless to insert special provisions enlarging the mortgagee's power of sale beyond that conferred by the statute, although the mortgagee would doubtless be bound by any special terms limiting his right to exercise the power. In Manitoba or Alberta an express power of sale would appear to be useless for any purpose (*l*), subject, in the case of Manitoba, to the statutory provisions presently to be noted as to sale without notice.

The Alberta statute also makes the power of sale "subject to the rights of any person having any estate, right or interest therein having priority to the mortgage or encumbrance," a provision which presumably is implied in the Manitoba and Saskatchewan statutes.

(i) Man. s. 119; Alta. s. 62a, sub-s. 6, as enacted by 1917 c. 3 s. 10.

(j) Because an abortive sale under the supervision of the registrar is a condition precedent to an application to the registrar for foreclosure. See §248, *infra*.

(k) Quoted in §246, *supra*.

(l) See chapter 31, *Sale under Power of Sale*, §74.

The Manitoba statute provides for sale in case the default continues for a further period of "one calendar month" instead of two calendar months as in the Saskatchewan and Alberta statutes, and adds:

"Provided that if the mortgage or encumbrance contains a provision that the sale may take place without any notice being served on any of the parties, the district registrar may order such sale to take place accordingly."

It is further provided by the Manitoba statute, s. 121A, as follows (m):

121A. Whenever a mortgage heretofore made, purporting to be made in pursuance of *The Real Property Act*, contains a power of sale which provides for a sale without notice, the mortgagee, his heirs, executors, administrators, successors or assigns, shall be held to have been always entitled to take proceedings to sell under the same according to the tenor of the power, as if the district registrar had at the time of such sale ordered the same to take place under section 119 of the said Act, provided default has continued under said mortgage for a period of ten years or more at the date of such sale; provided, however, that no purchaser under such power of sale shall be registered as owner unless the registrar general shall approve of the sale; and all such sales, in cases where certificates of title have already issued, are hereby confirmed and declared valid. This amendment shall not affect pending litigation or mortgages which have heretofore been the subject matter of any action or proceeding in court.

It has been held in Alberta that where a mortgagee applies to the registrar for a direction or sale, the registrar is entitled to require the production of (1) an affidavit of default and continued default, (2) an affidavit of value, (3) a statement of the amount due under the mortgage, with an estimate of the cost of sale proceedings, taxes, etc., (4) a reserve bid form, and (5) instructions to the auctioneer, in order (1) that he may satisfy himself that the mortgagee is entitled to sell (2) (3) and (4) that he may settle a reserve bid, and (5) that he

(c) This section was added by 1914 c. 90, s. 6.

The Saskatchewan statute, s. 110, provides:

purchase money shall be applied, firstly, in payment of the principal and interest due by such sale; secondly, in payment of the principal and interest due or owing to the mortgagee or encumbrancer of the first of the subsequent mortgages, encumbrances, if any, in the order of their priority; and finally, the balance shall be paid to the owner, mortgagor or person entitled thereto, as the case may be.

Such purchase money shall be paid into the Supreme Court in the judicial district in which the land is situate and there shall be paid thereon, upon the request of the mortgagee,

(b) The moneys due or owing to the mortgagee or encumbrance and proved before the registrar.

(c) *Re Sun Life Assurance Co. and Widmer*, 1916, 26 D.L.R. 147.

1. Main & 190. Main & 62a, sub-ss. 7 and 8, as enacted by 1915.

and amended by 1917, c. 3, § 40

Notwithstanding the provisions for payment of the subsequent mortgages, encumbrances and liens in order of their priority, subsequent execution creditors are to be paid *pari passu inter se* (p), provided no encumbrance intervenes between two groups of executions. If an encumbrance so intervenes, the execution creditors prior to the encumbrance are entitled to payment in priority to those subsequent to the encumbrance (q).

After an abortive auction sale the registrar may ratify a private sale which has been made without notice and without authority if he is satisfied that the mortgagor has no beneficial interest in the lands (r), but where the land has been sold at an auction sale, an agreement has been signed and the deposit paid but the sale has not been carried out, the registrar has no power to direct a resale or to deal further with the land except under the direction of the court (s).

The Saskatchewan statute s. 111, provides.

111. Upon the registration of any instrument executed by a mortgagee or encumbrancee for the purpose of such sale as aforesaid the estate or interest of the owner of the land mortgaged or encumbered shall pass to and be vested in the purchaser freed and discharged from all liability on account of such mortgage and of any mortgage, lien, charge or encumbrance created by any instrument registered subsequent thereto and the purchaser shall be entitled to receive a certificate of title for the same.

The Manitoba and Alberta statutes (t) are to the same effect.

(a) Under the Creditors Relief Ordinance. *Thompson v. Berg* 1910, 2 S.L.R. 470.

(b) This section was added to the statute by 1914, c. 90, s. 6.

(c) *Edmonton Mortgage Co. v. Gross*, 1911, 3 A.L.R. 500.

(d) *Re Sale of Mortgaged Premises by Private Contract*, 1914, W.W.R. 1328 (Sask.).

(e) *Re Duty of Registrar in Mortgage Proceedings*, [1917] W.W.R. 331 (Sask.).

(f) *Man. s. 121; Alta s. 62a sub s. 2, as amended by 1915, c. 3, s. 2.*

§248. *Foreclosure in the registrar's office.*

The Saskatchewan Land Titles Act, 1917, s. 112, provides:

112.—(1) When default has been made in payment of the principal or interest secured by a mortgage or encumbrance and such default has continued for six months after the time fixed for payment, the mortgagee or encumbrancee or his transferee may make an application in writing to the registrar for foreclosure.

(2) The application shall state that such default has been made and has continued for the period aforesaid, that the land mortgaged or encumbered has been offered for sale at public auction under the provisions of this Act (u), that the amount of the highest bid at the sale was not sufficient to satisfy the moneys secured by the mortgage or encumbrance together with the expense occasioned by the sale, and that the notice mentioned in section 108 (v) or subsequent notice served upon the same persons declared the intention of the mortgagee or encumbrancee to apply for foreclosure in case such sale should prove abortive.

(3) The application shall be accompanied by such proof of the matters stated by the applicant and such other evidence as the registrar may require.

The Alberta Land Titles Act (u) is to the same effect, except that the application for foreclosure must state that the amount of the highest bid "was not equal to nor greater than the reserve bid fixed by the registrar" instead of stating that it was not sufficient to satisfy the moneys secured by the mortgage together with the expenses.

The Saskatchewan statute, s. 113, provides:

113. Unless the registrar shall see fit to order otherwise, the notice, whether of intention to enter into possession of the lands and receive and take the rents, issues and profits thereof, or to sell or to apply for a foreclosure order, shall be served personally on the owner, mortgagor or encumbrancer and other persons interested as aforesaid (x); but in case any of such persons cannot after due diligence be found the registrar may direct service of the notice

(u) As to the provisions for sale, see §247, *supra*.

(v) See chapter 22, *Action for Possession*, §217, where s. 108 is quoted.

(w) Alta. s. 62a, sub-ss. 10, 11, 12, 13, as enacted by 1915, c. 3, and amended by 1917, c. 3, s. 40.

(x) Provided upon the mortgagor or encumbrancer, his executors, administrators or assigns and upon every other person ap-

by leaving it on the mortgaged lands, or by mailing it in a sealed envelope by registered post directed to him at his last known address, or in such other manner as the registrar may deem expedient.

The Alberta statute (*g*) is the same in effect, except that it omits the words "to enter into possession of the lands and receive and take the rents, issues and profits thereof" and adds, "and in case any person required to be served is deceased and such person has no legal representative, such notice shall be effectively served if served upon the public administrator for the district in which the lands subject to the mortgage or encumbrance are situate."

In place of ss. 112 and 113 of the Saskatchewan statute the Manitoba Real Property Act, s. 122, provides:

122. (1) Whenever default has been made in payment of the principal or interest moneys secured by a mortgage or encumbrance registered under the new or old system, or filed with the district registrar under section 105 of this Act (*a*), and such default continues for six months under the new system mortgages and for one year under any other mortgages above referred to after the time for payment mentioned in the mortgage or encumbrance, the mortgagee or encumbrancee, or his transferee or assign, may make application in writing to the district registrar for an order of foreclosure; and each application shall state that such default has been made and has continued for the period aforesaid, and that the land mortgaged or encumbered has been offered for sale at public auction after a notice of sale served as provided by *The Real Property Act* or by the terms of the mortgage, and that the amount of the highest bid at such sale was not sufficient to satisfy the moneys secured by such mortgage or encumbrance, together with the expenses occasioned by such sale; and such application shall be accompanied by such proof of the matters stated by the applicant and by such other evidence as the district registrar may require

bearing by the records of the land titles office at the date of registration of the notice to have any mortgage, encumbrance or lien upon or estate, right or interest in or to the lands subsequent to such first named mortgage or encumbrance," as specified in s. 108

(*g*) Alta. s. 62a, sub-s. 14, as enacted by 1915, c. 3, s. 2.

(*z*) R.S.M. 1913, c. 171, s. 122, as amended by 1917, c. 72, s. 1.

(*a*) I.e., filed while an application to bring the land under the Act is pending.

(2) The district registrar shall thereupon cause to be served on the mortgagor or encumbrancer, his executors, administrators or assigns, and every other person appearing at the time of filing such application to have any mortgage, encumbrance or lien upon, or estate, right or interest in or to the lands subsequent to the first named mortgage or encumbrance, a notice requiring them within the time limited by such notice to redeem the land from said mortgage or encumbrance, which time shall not be less than one month from the date of service of such notice.

(3) Unless the district registrar shall see fit to otherwise order, the notice of intention to sell under new system mortgages, or of foreclosure proceedings under either old or new system mortgages, or the notice requiring redemption, shall be served personally on such owner, mortgagor, and encumbrancer and other persons interested, as aforesaid; but in case he or they cannot after due diligence be found, the district registrar may direct service of such notice by being left on the mortgaged lands or being sent through the post office by a registered letter directed to him or them at his or their last known address, or in such other manner as the district registrar may direct.

(4) Before the foreclosure proceedings mentioned in this section shall apply, the land affected must be under *The Real Property Act*. In addition to the parties heretofore entitled to make an application to bring land under the operation of *The Real Property Act*, such application may in the discretion of the district registrar be made by the mortgagee or encumbrancee, or his transferee or his assign.

The Saskatchewan statute, s. 114, provides:

114. (1) Upon receipt of the application mentioned in section 112, the registrar may, if he considers it proper, cause notice to be published once in each of three consecutive weeks in one or more specified newspapers and in two consecutive issues of *The Saskatchewan Gazette*, offering such land for private sale.

(2) The registrar shall appoint a time not less than one month from the date of the first of such advertisements, or in case there is no advertisement not less than one month from the date of such application, when he may issue to the applicant an order of foreclosure, unless in the interval a sufficient amount of money has been obtained from the sale or paid by or on behalf of the owner, mortgagor or encumbrancer, or other person as aforesaid to satisfy the principal and interest and other moneys secured and all expenses occasioned by such sale and proceedings.

(3) Every such order of foreclosure under the hand of the registrar shall, when entered in the register, have the effect of vesting in the mortgagee or encumbrancee or his transferee the land

mentioned therein free from all right and equity of redemption on the part of the owner, mortgagor or encumbrancer or any person claiming through or under him subsequently to the mortgage or encumbrance; and such mortgagee, encumbrancee or transferee shall, upon such entry being made, be deemed a transferee of the land and become the owner thereof and be entitled to receive a certificate of title for the same.

The Manitoba statute (*b*) is to the same effect, except that the order may issue "after the expiration of the time appointed under section 122, and after the time for sale mentioned in such advertisement, if there be such advertisement."

The Alberta statute (*c*) has a provision to the same effect as sub-s. 3 of the Saskatchewan statute, but in place of sub-ss. 1 and 2, it provides:

On an application for foreclosure the registrar may issue to such applicant an order *nisi* in which he may direct that the applicant cause the land to be advertised for private sale; and directing that a final order may be made unless within the time provided for in such order *nisi*, which shall not be less than one month from the date thereof, a sufficient amount of money has been paid by or on behalf of the owner, mortgagor, or encumbrancer, to satisfy the principal, interest and costs of the proceedings or a sufficient amount of money has been realized from the sale of such land to satisfy the reserve bid;

Provided that the registrar may confirm a sale at any time before the final order of foreclosure has been granted and may approve of any sale at an amount less than the reserve bid.

The Saskatchewan statute, s. 115, provides:

115. (1) In case default is made in the payment of money due under a mortgage or in the observance of a covenant contained therein, and under the terms of the mortgage by reason of such default the payment of other portions of the principal money is accelerated (*d*) and such portions become presently due and payable, the mortgagor may, notwithstanding any provision to the contrary and at any time before sale, or before the grant of a final order of fore-

(*b*) Man. s. 123.

(*c*) Alta. s. 62a, sub-ss. 15, 16, as enacted by 1915, c. 3, s. 2, and amended by 1917, c. 3, s. 40.

(*d*) As to acceleration clauses, see chapter 23, *Action on the Covenant*, §226.

closure, perform such covenant or pay such arrears as are in default, with costs to be taxed by the registrar, and the mortgagor shall thereupon be relieved from immediate payment of so much of the money secured by the mortgage as may not have become payable by lapse of time.

(2) The provisions of this section shall apply to all mortgages whenever made.

It has been held that this provision is part of the general law of mortgages and is applicable to foreclosure by the court as well as to foreclosure before the registrar *(c)*.

The Manitoba statute *(f)* is to the same effect, except that it has the words, "the whole principal and interest secured thereby shall have become due and payable" instead of the words, "the payment of other portions of the principal money is accelerated and such portions become presently due and payable." It has been held that the provision is applicable to a mortgage under the "old system" *(g)*.

The Alberta statute contains the following additional provisions *(h)*:

(18) A Judge of the Supreme Court or a master in chambers may, from time to time, upon such terms as he shall think fit, on summary application by any person interested, which application may be made either in person or by attorney or solicitor, on notice to the mortgagee or encumbrancee by order stay any proceedings hereunder, and may upon such terms as he shall think fit on summary application made as aforesaid and on notice to the mortgagor or encumbrancer cancel such stay.

(19) Notices or copies thereof, which by this section are required to be served upon an execution creditor shall be sufficiently served if left with the solicitor of record in the suit upon which the execution is issued and any such notices or copies which are required to be served on caveators or mechanics' lien holders shall be sufficiently served if left with some person at the address for service mentioned in the caveat or mechanics' lien.

(20) For the purposes of this action in all proceedings instituted by any mortgagee or encumbrancee resident without the province

(c) *Wasson v. Harker*, 1912, 5 S.L.R. 364, 8 D.L.R. 88.

(f) *Man. s. 126*.

(g) *National Trust Co. v. Campbell*, 1908, 17 M.R. 587.

(h) Sub-s. 18 of s. 62a, as enacted by 1916, c. 3, s. 15; sub-s. 19 and 20 of s. 62a, as enacted by 1917, c. 3, s. 40.

there shall be endorsed upon the notice of default the name and address of some person within the Province of Alberta, upon whom service may be made on behalf of the person instituting such proceedings.

Until recently there was authority in favour of the view that foreclosure under the Land Titles Act has the effect of extinguishing the right to enforce the covenant for payment, but it has been held by the Supreme Court of Canada (i), reversing the Supreme Court of Alberta (j), that the taking and registration of an order for foreclosure does not extinguish the mortgage debt so as to disentitle the mortgagee from proceeding on the covenant to pay or from realizing on collateral security. It was previously held that a mortgagee who obtains a vesting order after an abortive sale was entitled to have a clause inserted in the order preserving his remedy on the covenant (k). In British Columbia, however, it has been held that a mortgagee who causes himself to be registered as owner of an indefeasible fee under a decree for foreclosure absolute thereby elects to take the land in satisfaction of his debt (l).

It has been held in Saskatchewan that foreclosure does not prevent the mortgagee from proceeding to realize the mortgage debt under the direction for payment contained in the order nisi provided he remains in a position to reconvey the mortgaged property, but that the effect of his so proceeding is to re-open the foreclosure (m), and in Manitoba a similar opinion has been expressed (n).

(i) Mutual Life Assurance Co. v. Douglas, 8 Oct. 1918.

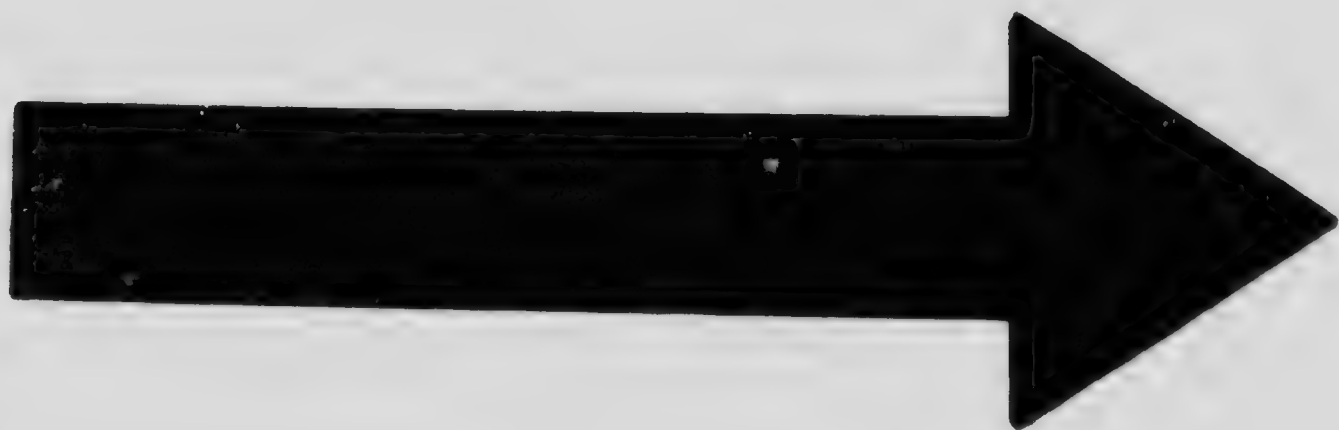
(j) Douglas v. Mutual Life Assurance Co., 1918, 13 A.L.R. 18, 8 D.L.R. 459, 39 D.L.R. 601, following Fink v. Robertson, 1907, 4 Commonwealth L.R. 864, and distinguishing Williams v. Box, 1910, 11 Can. S.C.R. 1.

(k) Bernard v. Faulkner, 1914, 7 A.L.R. 439, 18 D.L.R. 174.

(l) Scottish Temperance Life Assurance Co. v. District Registrar of Titles, 1917, 24 B.C.R. 232, 36 D.L.R. 152.

(m) Orser v. Colonial Investment and Loan Co., 1917, 10 S.L.R. 119, 37 D.L.R. 47.

(n) Noble v. Campbell, 1911, 21 M.R. 597.



CHAPTER XXV.

ACTION FOR REDEMPTION.

- §251. The right to redeem, p. 486.
- §252. When the right arises, p. 490.
- §253. Notice or interest after default, p. 493.
- §254. Tender, p. 496.
- §255. Payment, p. 500.
- §256. Who may be plaintiffs, p. 503.
- §257. Who must be defendants, p. 506.
- §258. Writ and interlocutory judgment, p. 509.
- §259. Proceedings in the master's office, p. 511.

§251. *The right to redeem.*

When by default in payment according to the terms of a mortgage the mortgagor has forfeited his legal or contractual right to redeem, he has nevertheless an equitable right to redeem, commonly known as the equity of redemption. This equitable right to redeem is an inevitable term of the mortgage, of which the mortgagor cannot deprive himself by any agreement made at the time of or as part of the mortgage transaction (*a*). It may, however, be subsequently forfeited or terminated in various ways (*b*).

There are *obiter dicta* to the effect that an equity of redemption is an estate in the mortgaged lands, and the conclusion has been drawn that the mortgagor has in equity an absolute right to redeem and that the right is one over which the court has no discretionary power provided the right is not barred by the statutes of limitation (*c*). It is, however,

(*a*) See chapter 3, *Legal Mortgage in Equity*, §23.

(*b*) See chapter last cited, §29.

(*c*) *Martin v. Miles*, 1883, 5 O.R. 404, at p. 416. The broad proposition stated in this case was not necessary to the decision, which

only by a figure of speech that the equity of redemption is called an estate in the mortgaged lands, and it is only for certain purposes that it is treated as if it were an estate in the lands (*d*).

The equitable right to redeem being a right invented by courts of equity is granted only on equitable terms (*e*), and may be refused in certain circumstances if the granting of it would be inequitable, whereas if a person asserts a legal right a court cannot refuse to give effect to it and cannot impose terms (*f*). It is settled that the court applying the maxim *He who seeks equity must do equity*, may impose terms as a condition precedent to the enforcement of a claim for equitable relief, or applying the maxim *He who comes into equity must come with clean hands*, it may consider all the circumstances in order to decide whether it is equitable to grant the relief at all (*g*).

Redemption may be refused on the ground of laches or staleness of demand even though the claim is not barred by any statute of limitation. The "principle on which an equity of redemption is founded is relief against forfeiture, and the

was simply that a tenant under a lease made by the mortgagor after he had mortgaged the lands was a necessary party to a foreclosure action as being a person interested in the equity of redemption.

(*d*) See chapter 3, *Legal Mortgage in Equity*, §28, especially the case of *Paget v. Ede*, 1874, L.R. 18 Eq. 118, at p. 125, there cited.

(*e*) See, e.g., the doctrine of consolidation of mortgages in chapter 9, *Consolidation and Tacking*.

(*f*) If tender of the mortgage debt, with interest and costs, is made by the mortgagor to the mortgagee on the day fixed for repayment, and the tender is refused, and in consequence the mortgagor sues for redemption, the redemption asked for is not equitable but legal relief, and the giving of the relief will not be subject to equitable principles. *Strahan, Law of Mortgages*, 2nd ed., pp. 137-138.

(*g*) *Yorkshire Railway Wagon Co. v. Maclure*, 1881, 19 Ch.D. 178, at p. 484; *In re Maddever*, *Three Towns Banking Co. v. Maddever*, 1884, 27 Ch.D. 523; *Blake v. Gale*, 1886, 32 Ch.D. 571.

equity is not to be allowed where the mortgagee has been guilty of no misconduct and from the dealings of the parties the allowance would work injustice" (*h*). Thus where a mortgagor neglected for twenty-one years to prosecute a decree for redemption against a mortgagee in possession, although owing to the pendency of the action the right to redeem was not barred by the statute of limitation, a purchaser from the mortgagee was held entitled to a certificate of title under the Quieting Titles Act (*i*).

A bill for redemption of a mortgage was dismissed in the following circumstances. The mortgagee had bought the equity of redemption at a sheriff's sale which at the time was supposed by all parties to be valid though it was in fact invalid on technical grounds. For seventeen years before the filing of the bill to redeem, sales and resales had been made from time to time of various portions of the property, buildings had been erected, altered, destroyed, and replaced, etc., all with the cognizance of the mortgagor's heir, who for ten of the seventeen years was aware of, or had reason to suspect, the defect in the title of the parties. The bill was not filed until a large unsecured claim of the mortgagee against the mortgagor, greatly exceeding the value of the property at the time of the sheriff's sale, had been outlawed, and until the persons interested in resisting the plaintiff's claim and made defendants to the suit numbered nearly one hundred (*j*).

The provision of the English Real Property Limitations Act, 3 & 4 W. 4, c. 27, s. 27, is preserved in the Limitations Act, R.S.O. 1914, c. 75, s. 3, as follows:

3. Nothing in this Act shall interfere with any rule of equity in

(*h*) *Skae v. Chapman*, 1874, 21 Gr. 534.

(*i*) *Re Leslie*, 1893, 23 O.R. 143; cf. *Eaton v. Dorland*, 1893, 15 O.P.R. 138.

(*j*) *Skae v. Chapman*, 1874, 21 Gr. 534. This case was followed in *Kay v. Wilson*, 1876, 24 Gr. 212, and was referred to with apparent approval in *Dougall v. Dougall*, 1879, 26 Gr. 401, at p. 408.

refusing relief on the ground of acquiescence, or otherwise, to any person whose right to bring an action is not barred by virtue of this Act.

When the court allows a mortgagor to redeem after default the relief given is personal in its nature, and therefore the court, acting *in personam* (*k*), may entertain an action for redemption against a mortgagee who is within the jurisdiction, notwithstanding that the land in question is without the jurisdiction (*l*).

The court will not, however, grant relief by a decree *in personam* as to lands without the jurisdiction of the court unless there is some contractual obligation, express or implied, or some trust or equity between the parties. Thus the court refused a decree for redemption of a mortgage on lands in Manitoba at the suit of a judgment creditor of the mortgagor, whose judgment was by the Manitoba statute a charge upon the lands, the judgment creditor and the mortgagee both being domiciled in Ontario, for the plaintiff's claim was under a statutory charge which did not create any equity enforceable *in personam* (*m*).

The court will not entertain an action to set aside a mortgage of land without the jurisdiction and to declare the defendant a trustee (on the ground that the mortgage was taken in pursuance of a fraudulent scheme to defraud creditors of the original owner through whom the mortgagee claimed) or, in effect, give the plaintiff relief by way of equitable execution out of the mortgagee's interest (*n*), or an action for a

(*k*) *Penn v. Lord Baltimore*, 1750, 1 Ves. Sen. 444, 1 W. & T.L.C. Eq. 800. See also chapter 24, *Action for Foreclosure or Sale*, §231.

(*l*) *Beckford v. Kemble*, 1822, 1 Sim. & St. 7; *Bent v. Young*, 1828, 9 Sim. 180.

(*m*) *Henderson v. Bank of Hamilton*, 1893, 23 Can. S.C.R. 716, affirming 20 O.A.R. 646.

(*n*) *Purdum v. Pavey*, 1896, 26 Can. S.C.R. 412, reversing 23 O.A.R. 9; *Burns v. Davidson*, 1892, 21 O.R. 547.

declaration that a deed in the form of an absolute conveyance of land without the jurisdiction is really a mortgage (*o*).

§252. *When the right to redeem arises.*

Although a mortgagor cannot at the time of the making of the mortgage and as part of the mortgage transaction, contract himself out of his equity of redemption (*p*), a mortgage may be made irredeemable for a reasonable period (*q*), at least if the provision to that effect is mutual (*r*).

As a general rule a mortgagor is not entitled to redeem before the day fixed in the mortgage contract for payment of the principal (*s*), unless the mortgagee has taken steps to recover payment by taking possession or otherwise (*t*), or unless the day fixed for redemption is unreasonably distant (*u*).

In the case of a Welsh mortgage the mortgagor may redeem at any time (*v*), but generally in other cases the time

(*o*) *Gunn v. Harper*, 1901, 2 O.L.R. 611.

(*p*) See chapter 3, *Legal Mortgage in Equity*, §23.

(*q*) *Teevan v. Smith*, 1882, 20 Ch.D. 724, at p. 729; *Biggs v. Hoddinott*, [1898] 2 Ch. 307; *Bradley v. Carritt*, [1903] A.C. 253, at p. 259.

(*r*) *Morgan v. Jeffreys*, [1910] 1 Ch. 620; in this case a provision that the mortgagor, without the consent of the mortgagee, should not be entitled to redeem until the end of 28 years was held to be unreasonable and unenforceable.

(*s*) *Brook v. Cole*, 1845, 14 Sim. 427, 18 R.C. 116. In this case the mortgagor, having an advantageous offer for the property, tendered to the mortgagee the principal with interest to the day named in the mortgage for payment. A demurrer to a bill for redemption for want of equity was allowed. As to a stipulation in the mortgage that the money shall not be called in for a certain time, see the notes in 18 R.C. at p. 117.

(*t*) 21 Halsbury, *Laws of England*, p. 147, citing *Bovill v. Endle*, [1896] 1 Ch. 648; *Ex parte Wickens*, [1898] 1 Q.B. 543, at p. 548.

(*u*) 21 Halsbury, *Laws of England*, p. 143. See also the statutory provisions, hereinafter referred to, applicable to the case of a mortgage which by its terms is not repayable until more than five years after its date.

(*v*) See chapter 1, *Introductory*, §2.

for payment of the mortgage money must be ascertained or ascertainable by reference to a fixed day or to the happening of a certain event. If the time be uncertain or of unreasonable duration redemption may be decreed in a reasonable time (*w*). Redemption was allowed before the day named for payment where by the proviso the mortgagor was entitled to redeem on the day named or on payment before or after it (*x*).

If in an action of foreclosure upon a mortgage which contains an acceleration clause the mortgagee claims the benefit of the clause and calls in the whole mortgage debt, he is bound by his election and must accept principal, interest and costs, whenever tendered, even though he does not seek an order for immediate payment (*y*).

Where, pursuant to any condition or proviso contained in a mortgage, there has been made or given a demand or notice requiring payment of all money secured by the mortgage the person making such demand or giving such notice is bound to accept and receive payment of the same if made as required by the terms of such demand or notice (*z*).

If a mortgage is made payable on demand, or if no time is fixed for payment, as in the case of an equitable mortgage by deposit of title deeds or other informal mortgage, the mortgagor may redeem at any time, as the mortgagee has the correlative right at any time to call in the loan (*a*).

It is provided by the Interest Act, R.S.C. 1906, c. 120, s. 10, as follows (*b*):

10. Whenever any principal money or interest secured by mortgage of real estate is not, under the terms of the mortgage, payable

(*w*) *Newcomb v. Bonham*, 1681, 1 Vern. 7.

(*x*) *Harding v. Tingey*, 1865, 10 Jur. N.S. 872.

(*y*) *Cruso v. Bond*, 1882, 1 O.R. 384.

(*z*) R.S.O. 1914, c. 112, s. 30, quoted in chapter 31, *Sale under Power of Sale*, §340.

(*a*) *Fitzgerald's Trustee v. Mellersh*, [1892] 1 Ch. 385.

(*b*) This section applies only to a mortgage executed after the 1st of July, 1880. R.S.C. 1906, c. 120, s. 11.

till a time more than five years after the date of the mortgage, then, if, at any time after the expiration of such five years, any person liable to pay or entitled to redeem the mortgage tenders or pays, to the person entitled to receive the money, the amount due for principal money and interest to the time of payment, as calculated under the provisions of the four sections last preceding (*c*), together with three months' further interest in lieu of notice, no further interest shall be chargeable, payable or recoverable at any time thereafter on the principal money or interest due under the mortgage; Provided that nothing contained in this section shall apply to any mortgage upon real estate given by a joint stock company or other corporation, nor to any debenture issued by any such company or corporation, for the payment of which security has been given by way of mortgage on real estate.

In an action to compel a mortgagee in Great Britain to accept the principal money and interest due on a ten-year mortgage, which had run over six years, it was held that the foregoing section is *intra vires* of the dominion parliament and is not restricted in its application to such mortgages as are mentioned in s. 6 of the act, but applies to every mortgage on real estate executed after the 1st of July, 1880, where the money secured "is not under the terms of the mortgage payable till a time more than five years after the date of the mortgage." It was also held that the loan having been made, the property being situate, and the mortgage giving the option of payment, in Canada, the law of Canada must govern in relation to the contract and its incidents and that the tender made and accepted in the judgment was sufficient (*d*).

A short time after this decision, and doubtless because the question of legislative jurisdiction was therein raised (*c*), a similar statute was passed in Ontario, and it is now provided by the Mortgages Act, R.S.O. 1914, c. 112, s. 17, as follows:

(*c*) The sections referred to relate to the rate of interest and are discussed in chapter 29, *Interest*, §§312, 313.

(*d*) *Bradburn v. Edinburgh Life Assurance Co.*, 1903, 5 O.L.R. 657; cf. *In re Parker, Parker v. Parker*, 1894, 24 O.R. 373.

(*e*) As to the question of legislative jurisdiction, see also chapter 29, *Interest*, §318.

17.—(1) Where any principal money or interest secured by a mortgage of freehold or leasehold property, made after the 1st day of July, 1903, is not, under the terms of the mortgage, payable till a time more than five years after the date of the mortgage, then, if, at any time after the expiration of such five years, any person liable to pay or entitled to redeem tenders or pays to the person entitled to receive the money the amount due for principal money and interest to the time of such tender or payment, together with three months' further interest in lieu of notice, no further interest shall be chargeable, payable or recoverable at any time thereafter on the principal money or interest due under the mortgage.

(2) Nothing in this section shall affect the provisions of sub-section 5 of section 35 of *The Loan and Trust Corporations Act*, or shall apply to any mortgage given by a joint stock company or other corporation nor to any debenture issued by any such company or corporation for the payment of which security has been given on freehold or leasehold property.

§253. *Notice or interest after default.*

The question of the rate of interest payable under a mortgage after maturity is discussed elsewhere (*f*), but the question of notice or interest in lieu of notice after maturity belongs to the subject matter of the present chapter.

Apart from statute and as a general rule, where it may be inferred from the transaction that the loan is intended to be of a permanent character (*g*) a mortgagor must, after default in payment on the day, give to the mortgagee six months' notice of his intention to pay off the mortgage or pay six months' interest in lieu of notice (*h*). This rule is founded on the equitable maxim that "he who seeks equity must do equity," and a mortgagor who comes into equity for relief after his estate is forfeited at law is required as the price of redemption to deal equitably by his mortgagee and give him a reasonable time to find a new investment for his money (*i*).

(*f*) See chapter 29, *Interest*, §§313, 314.

(*g*) *Fitzgerald's Trustee v. Mellersh*, [1892] 1 Ch. 385.

(*h*) *Smith v. Smith*, [1891] 3 Ch. 550, 18 R.C. 119; *Archbold v. Building and Loan Association*, 1888, 15 O.R. 237.

(*i*) *Browne v. Lockhart*, 1840, 10 Sim. 420.

The period of six months, it will be observed, is the same as that which is allowed in actions for redemption and foreclosure or sale.

A mortgagor may, at any time after default, redeem the mortgage without notice if he pays six months interest in lieu of notice (*j*). Where the mortgage deed reserves an option to the mortgagor to pay off the mortgage moneys or any part thereof at any time before the expiration of the mortgage, and the parties after the maturity of the mortgage continue to deal upon its terms as far as applicable, the option may still be exercised by the mortgagor after the maturity of the mortgage, and the mortgagee is not entitled to six months' notice (*k*).

If a mortgagee demands payment or takes any steps to enforce his security he will not be entitled to notice or interest in lieu of notice (*l*).

If six months' notice is given and the money is not paid on the very day of the expiration of the notice the mortgagee may require a further six months' notice or interest in lieu of notice (*m*), but if a mortgagee, after receiving six months' notice, unreasonably refuses a tender of the debt with interest and costs, interest ceases to run from the date of the tender (*n*).

In a case in England an order for foreclosure was made in the usual form, and the usual certificate also was made appointing a day six calendar months from the date of the cer-

(*j*) *Hutton v. Brown*, 1831, 45 L.T. 343; *Johnson v. Evans*, 1889, 61 L.T. 18.

(*k*) *Archbold v. Building and Loan Association*, 1888, 16 O.A.R. 1; *Banner v. Berridge*, 1881, 18 Ch.D. 254.

(*l*) *Lett v. Hutchins*, 1871, L.R. 13 Eq. 176; *Bovill v. Endle*, [1896] 1 Ch. 648; *Re Houston*, *Houston v. Houston*, 1882, 2 O.R. 84.

(*m*) *In re Moss*, *Levy v. Sewill*, 1885, 31 Ch.D. 90; *Garforth v. Bradley*, 1755, 2 Ves. Sen. 675, at p. 678; *Bank of New South Wales v. O'Connor*, 1889, 14 A.L.J. Cas. 273.

(*n*) *Edmondson v. Copland*, [1911] 2 Ch. 301.

tificate as the time of redemption, on payment of the principal money with interest up to that day and costs, and it was held that the mortgagor could not claim to redeem on an earlier day, on payment of the principal money with interest up to the time of payment only and the costs (o).

The foregoing statement of the law must in Ontario be read subject to the provisions of the Mortgages Act, R.S.O. 1914, c. 112, ss. 15 and 16, as follows:

15.—(1) In the case of mortgages made after the 1st day of July, 1888, and before the 12th day of June, 1903, unless it is otherwise expressly provided in the mortgage or otherwise with respect to notice or the payment of interest in lieu of notice, the mortgagor may pay the whole principal money if overdue or any instalment thereof which has become payable according to the terms and conditions of the mortgage without previous notice to the mortgagee and without the payment of any interest in lieu of such notice.

(2) Principal money or any instalment thereof shall not be deemed to be overdue or payable within the meaning of this section where it has become payable only by reason of default in payment of part of the principal or interest.

16.—(1) Notwithstanding any agreement to the contrary, where default has been made in the payment of any principal money secured by a mortgage of freehold or leasehold property made on or after the 12th day of June, 1903, the mortgagor or person entitled to make such payment, may at any time, upon payment of three months' interest on the principal money so in arrear, pay the same, or he may give the mortgagee at least three months' notice, in writing, of his intention to make such payment at a time named in the notice, and in the event of his making such payment on the day so named he shall be entitled to make the same without any further payment of interest except the due of payment.

(2) If the mortgagor or person entitled to make such payment fails to make the same on the time mentioned in the notice he shall thereafter be entitled to make such payment only on paying the principal money so in arrear together with the interest thereon to the date of payment together with the interest in advance.

(3) Nothing in this section shall affect or limit the right of the mortgagee to recover by action the principal money so in arrear after default has been made.

(o) Hill v. Rowlands, [1888] 13 Q.B. 101.

If a mortgage becomes due by virtue of an acceleration clause which provides that the mortgagor on payment of the arrears shall be relieved from the consequences of his default, the court will also relieve against a provision in the mortgage that in case of default the mortgagor shall not be at liberty to pay the mortgage except after notice or upon payment of interest in lieu of notice (*p*).

It has been held that the English rule which requires a mortgagor in default to give to the mortgagee six months' notice of his intention to pay the mortgage debt or in lieu of notice to pay six months' additional interest is not in force in Alberta (*q*).

§254. *Tender.*

It is the duty of a mortgagee on being paid by the mortgagor the principal, interest and costs due upon the mortgage and contemporaneously with such payment, to hand to the mortgagor the title deeds together with a duly executed reconveyance (*r*) of the mortgaged property (*s*). Therefore where a mortgagor who had given notice to the mortgagee that he would attend for that purpose made a tender of the amount due and the mortgagee refused to hand over to the mortgagor then and there an endorsed reconveyance of the mortgage property, together with the title deeds, and an action for redemption was subsequently brought by the mortgagor, the court refused to allow the mortgagee interest and costs subse-

(*p*) *Schwartz v. Williams*, 1915, 35 O.L.R. 33, 27 D.L.R. 733.

(*q*) *Re Pambrun and Short*, 1914, 7 A.L.R. 314, 16 D.L.R. 193, adopting the dissenting opinion of Armour, C.J. in *Archbold v. Building and Loan Association*, 1888, 15 O.R. 237, S.C. reversed on another point, 16 O.A.R. 1.

(*r*) Or, in Ontario, a duly executed discharge, if the mortgagor does not require a reconveyance.

(*s*) *Rourke v. Robinson*, [1911] 1 Ch. 480, following *Walker v. Jones*, 1866, L.R. 1 P.C. 50, at p. 61.

agent to the date of the tender and ordered him to pay costs of the action (*t*).

A tender by a mortgagor to a mortgagee of mortgage monies due need not, in order to prevent further interest running, necessarily be such a tender as would afford a defence to an action at law (*u*), but where the tender is made conditional on the execution of a reconveyance, a reasonable time must be allowed in which to obtain the execution of the deed, especially when the conveying parties are not the persons to whom the tender is made (*v*).

If a person entitled to redeem makes a proper tender of the amount due, the mortgagee will not be entitled to recover interest accruing or costs incurred thereafter (*w*), but the person liable to pay must keep the money ready to pay over on demand to the mortgagee (*x*).

A tender to be good must be made by a person entitled to redeem; tender by a stranger is not good, for as against a stranger the mortgagee's estate is absolute. It may be made by the solicitor or agent of the person entitled to redeem (*y*).

A tender may be made to the mortgagee, or to any other person entitled to receive the money and reconvey the estate,

(*t*) *Rourke v. Robinson*, *supra*, following *Cotterell v. Stratton*, 1872, L.R. 8 Ch. 295, at p. 302. It has been held in New Brunswick that a tender by the mortgagor of the amount due on a mortgage accompanied by a demand for a discharge of the mortgage and a release of the debt is conditional, and does not deprive the mortgagee of his costs in a redemption suit. *McKenzie v. McLeod*, 1909, 39 N.B.R. 230, 4 N.B. Eq. 72.

(*u*) *Webb v. Crosse*, [1912] 1 Ch. 323, following *Manning v. Burges*, 1663, 1 Cas. in Ch. 29.

(*v*) *Webb v. Crosse*, *supra*, following *Wilshire v. Smith*, 1744, 3 Atk. 89.

(*w*) *Knapp v. Bower*, 1871, 17 Gr. 695; *Bishop v. Church*, 1751, 2 Ves. Sen. 370; *Loid Middleton v. Elliot*, 1847, 15 Sim. 331.

(*x*) *Kinnaird v. Trollope*, 1889, 42 Ch.D. 610; *Bank of New South Wales v. O'Connor*, 1889, 14 App. Cas. 273; *Knapp v. Bower*, 1871, 17 Gr. 695; *Edmondson v. Copland*, [1911] 2 Ch. 301.

(*y*) *Ward v. Carttar*, 1865, L.R. 1 Eq. 29.

as for example, a trustee of the mortgagee, his assignee, or his executors or administrators (*c*). A tender to a solicitor or other agent of the mortgagee will not be good unless he has authority to receive the mortgage money (*a*).

If a place is appointed for payment the tender must be made at that place. If the mortgagee has demanded payment or if the mortgagor is willing to pay six months' interest in lieu of notice, a tender may be made at any time, but if the money is payable at a time certain by the mortgage contract, or at the expiration of a six months' notice after default, the tender must be made on the very day (*b*).

In order to constitute a good tender there must be actual production and offer of the money, unless waived by the mortgagee. Actual production may be dispensed with if the creditor refuses to accept the money when the debtor offers to produce it, but before he has actually produced it, but the debtor must have the money ready to pay at the time when he offers to do so (*c*).

A tender made by letter without actually enclosing the money is not good (*d*). The exact amount must be tendered; a tender of a larger sum requiring change is not a good tender (*e*), and the whole amount due must be tendered; the mortgagor cannot tender a less sum and claim a set-off for the remainder (*f*).

(*c*) *Chil v. Wadsworth*, 1843, 2 Y. & C.C.C. 598.

(*a*) *Withington v. Tate*, 1869, L.R. 4 Ch. 288.

(*b*) *Briggs v. Calverley*, 1800, 8 T.R. 629. In Ontario, see however, s. 16 of the Mortgages Act, quoted in §253, *supra*.

(*c*) *Lake v. Biggar*, 1860, 11 U.C.C.P. 170; *Thomson v. Hamilton*, 1835, 5 U.C.O.S. 111; *Milburn v. Milburn*, 1847, 4 U.C.R. 179; *Polglass v. Oliver*, 1831, 2 Cr. & J. 15; *Harding v. Davies*, 1825, 2 C. & P. 77; *Douglas v. Patrick*, 1790, 3 T.R. 683; *Kraus v. Arnold*, 1822, 7 Moo. 59; *Reynolds v. Allan*, 1852, 10 U.C.R. 359; *Long v. Long*, 1870, 17 Gr. 251; *Middleton v. Scott*, 1902, 4 O.L.R. 459.

(*d*) *Powney v. Blomberg*, 1844, 14 Sim. 179.

(*e*) *Cottrell v. Finney*, 1871, L.R. 9 Ch. 541.

(*f*) *Searles v. Sadgrave*, 1855, 5 E. & B. 639.

A tender to be valid must not be subject to any condition (*g*) other than the requirement that a receipt should be given (*h*) or that the title deeds and a reconveyance or discharge should be handed over (*i*).

A tender of the amount claimed under protest and reserving the right of the mortgagor to dispute the amount due is valid (*j*). A tender of mortgage money, accompanied by a statement that the person tendering did not consider that the amount tendered was due and that the person to whom the tender was made would thereafter be compelled to repay the excess, was held not to have been invalidated by the statement, but it was held in the same case that a tender to the holder of a mortgage, who claimed a larger sum, with a condition that the mortgage, on the sum tendered being accepted, should be given up was bad as being conditional (*k*).

If the mortgagee refuses to accept the moneys when a proper tender is made, and to execute a discharge or reconveyance, he may be compelled to do so and may be ordered to pay the costs of an action for that purpose (*l*).

If a sale is made by the mortgagee under the power of sale in the mortgage, after a proper tender has been made, it will be set aside if the purchaser had notice of the tender (*m*).

A mortgagee's solicitor may not accept a cheque in payment unless he has authority to do so; consequently the tender

(*g*) *Jennings v. Major*, 1837, 8 C. & P. 61.

(*h*) *Lockridge v. Lacey*, 1870, 30 U.C.R. 494.

(*i*) *Rourke v. Robinson*, *supra*, p. 497.

(*j*) *Sweny v. Smith*, 1869, L.R. 7 Eq. 324; *Peers v. Allen*, 1872, 19 Gr. 98.

(*k*) *Peers v. Allen*, 1872, 19 Gr. 98.

(*l*) *Harmer v. Priestley*, 1853, 16 Beav. 569.

(*m*) *Jenkins v. Jones*, 1860, 2 Giff. 99.

of a cheque is not a good tender in the absence of such authority (*n*).

Legal tender in Canada is governed by the Currency Act, 1910, and the Dominion Notes Act, 1914. Dominion notes, gold coins struck by the authority of the crown for circulation in Canada, British sovereigns and multiples or divisions thereof (at the rate of \$4.86 2-3 to the sovereign), and gold coins of the United States coined since the 18th January, 1837, of the present weight and standard of fineness, are legal tender in Canada for a payment of any amount. Silver and bronze coins of the currency of Canada are legal tender for payments of any sums not exceeding ten dollars and twenty-five cents respectively (*o*). Bank notes are not legal tender, but a bank is obliged always to receive in payment its own notes at par at any of its branches, agencies or offices (*p*).

§255. *Payment.*

Payment to be valid must be made to the mortgagee or her person entitled to the money or his duly authorized agent.

Payment to one of two or more mortgagees on a joint debt, or to one of two or more executors of a mortgagee, is good (*q*). Where, however, mortgagees have advanced money on a joint account, payment to one of them during the other's lifetime, though a good discharge of the debt at law, discharges the security only to the extent of the payee's beneficial interest (if any), even though the payee becomes the survivor in the joint account (*r*).

(*n*) *Blumberg v. Life Interests, etc., Corporation*, [1897] 1 Ch. 171, [1898] 1 Ch. 27.

(*o*) 9 & 10 E. 7, c. 14; 5 G. 5, c. 4.

(*p*) Bank Act, 3 & 4 G. 5, c. 9, s. 71.

(*q*) *Wallace v. Kelsall*, 1840, 7 M. & W. 264; *Steeds v. Steeds*, 1889, 22 Q.B.D. 537; *Ewart v. Dryden*, 1867, 13 Gr. 50.

(*r*) *Powell v. Brodhurst*, [1901] 2 Ch. 160.

If payment be made to a person not duly authorized by the mortgagee it will not be a good payment. Thus, the employment of a person to serve a notice demanding payment of the mortgage money does not give him an implied authority to receive it (*s*), and where a person has authority to receive interest on a mortgage that alone does not imply authority to receive the principal (*t*). An agent who is authorized to collect rent, and to contract for the sale of property and receive payment of the purchase money, is not thereby authorized to receive payments on a mortgage given for the unpaid purchase money (*u*).

The onus of showing that a solicitor who is in possession of a mortgage and collects the interest has authority also to collect the principal is upon the mortgagor, and unless this onus is clearly discharged the mortgagor and not the mortgagee must bear the loss arising from the solicitor's misappropriation of the funds (*v*).

The custody of a mortgage gives no right to the custodian, whether he be the solicitor of the mortgagee or not, to receive any part of the principal or interest secured. A mortgage not only secures money, but affects the land; and for its effectual discharge not only payment but reconveyance is essential, and for this reason the law does not infer a right to receive the money from the mere possession of this kind of security (*w*). But payment made to the solicitor employed by the mortgagee

(*s*) *Toms v. Wilson*, 1862, 4 B. & S. 442.

(*t*) *Palmer v. Winstanley*, 1874, 23 U.C.C.P. 586.

(*u*) *Greenwood v. Commercial Bank of Canada*, 1867, 14 Gr. 40.

(*v*) *In re Tracy*, *Scully v. Tracy*, 1894, 21 O.A.R. 454; *Wilkinson v. Candlish*, 1854, 5 Ex. 91; *Kent v. Thomas*, 1856, 1 H. & N. 473; *Scully v. Robertson*, 1894, 30 C.L.J. 472; *McMullen v. Polley*, 1886, 12 O.R. 702.

(*w*) *Gillen v. The Roman Catholic Episcopal Corporation of the Diocese of Kingston*, 1884, 7 O.R. 146

to bring an action to recover the mortgage money is valid and will discharge the mortgagor (*x*).

Formerly an agreement to accept payment of a smaller sum, on or after the day named for payment, in discharge of a larger sum was *nudum pactum* and not enforceable (*y*).

Where, however, there was a dispute as to the amount due; or where the money was paid before it was due; or where a chattel, cheque or promissory note, though of less value, was given and accepted in satisfaction; or where that which was given in satisfaction was more beneficial to the mortgagee, this was considered sufficient to support a defence of accord and satisfaction (*z*).

In Ontario, however, it is now provided by the Mercantile Law Amendment Act, R.S.O. 1914, c. 133, s. 16, as follows:

16. Part performance of an obligation either before or after a breach thereof when expressly accepted by the creditor in satisfaction, or rendered in pursuance of an agreement for that purpose, though without any new consideration, shall be held to extinguish the obligation.

Where a cheque was given in full of all demands but accepted only on account, it was held that the keeping of the cheque was not conclusive (*a*).

Mortgagees sent a written notice to the mortgagor stating that the sum of £48, 5s. 8d. which would shortly become due to them should be paid at their office, and asking the mortgagor "when remitting" to return the notice. The mortgagor sent to the mortgagees by registered post a packet containing £48 in treasury notes and a postal order and stamps for 5s. 8d.

(*x*) *Bourton v. Williams*, 1870, L.R. 5 Ch. 655; but see *Palmer v. Winstanley*, 1874, 23 U.C.C.P. 586.

(*y*) *Foakes v. Beer*, 1883, 9 App. Cas. 605.

(*z*) *Curlew v. Clark*, 1849, 3 Ex. 375; *Goddard v. O'Brien*, 1882, 9 Q.B.D. 37; *Bidder v. Bridges*, 1887, 37 Ch.D. 406.

(*a*) *Day v. McLea*, 1889, 22 Q.B.D. 610; *Mason v. Johnston*, 1893, 20 O.A.R. 412.

The packet was stolen before it reached the mortgagees and they never received the money. It was held that by the use of the word "remitting" the mortgagees had impliedly authorized the mortgagor to pay them by sending the money through the post in the ordinary way in which money was remitted by post, but that it was not usual to send so large a sum as £48 in treasury notes by post, and that the mortgagor had therefore failed to prove that he had paid his debt to the mortgagees (b).

A mortgage given to secure a floating balance is not discharged by payments made on account, so long as the dealings between the parties continue and any balance remains due in respect thereof, even although the payments exceed in amount the debt due when the mortgage was made or the sum mentioned in the mortgage (c).

§256. *Who may be plaintiffs.*

Anyone may bring an action to redeem who has any interest of any kind in the equity of redemption (d), or who is liable for the mortgage debt and is sued on such liability; and anyone who is entitled to bring an action to redeem any part of the property subject to the mortgage is entitled to bring an action to redeem it all (e).

Thus, the mortgagor, if he still retains any interest in the equity of redemption, or the assignee of the equity of redemp-

(b) *Mitchell-Henry v. Norwich Union Life Insurance Society*, [1918] 2 K.B. 67.

(c) *Cameron v. Kerr*, 1878, 3 O.A.R. 30; *Griffith v. Crocker*, 1891, 18 O.A.R. 370.

(d) As to the general principle that a person claiming the right to redeem a mortgage must show some title to the equity of redemption and that against other persons the estate is the property of the mortgagee, see *James v. Bion*, 1819, 3 Swanst. 234, 18 R.C. 166.

(e) *Strahan, Law of Mortgages*, 2nd ed., p. 138. The following discussion of the parties to a redemption action is based on *Strahan*, pp. 138-142.

tion, including a subsequent mortgagee (*f*) or a tenant of the mortgagor where the lease was made after the mortgage and is not binding on the mortgagee (*g*), is a proper plaintiff in an action for redemption. If the mortgagor dies entitled to the equity of redemption, the persons entitled under him may redeem (*h*).

Assignees of the equity of redemption, including subsequent mortgagees, are entitled to redeem in the order in which they have acquired rights in the equity of redemption (*i*), but a subsequent mortgagee has no right to redeem a prior mortgage unless both mortgages are overdue (*j*). As between persons equally entitled inter se to redeem, priority is acquired by the one who first brings an action or obtains a judgment for redemption (*k*).

Persons having a limited interest in the equity of redemption, such as a life tenant (*l*), one of several tenants in com-

(*f*) A subsequent mortgagee is of course an assignee of the equity of redemption. See chapter 14, *Transferee of the Equity of Redemption*, §131.

(*g*) Such a tenant is an assignee *pro tanto* of the equity of redemption, and is entitled to redeem unless the mortgagee will confirm his tenancy. *Martin v. Miles*, 1883, 5 O.R. 404. *Canada Permanent Loan and Savings Co. v. Macdonnell*, 1875, 22 Gr. 461; *Keech v. Hall*, 1778, Dougl. 21, 18 R.C. 123; *Tarn v. Turner*, 1888, 39 Ch.D. 456. See chapter 15, *Lessee of Mortgaged Land*.

(*h*) See chapter 17, *Persons entitled on Death of the Mortgagor*; cf. chapter 24, *Action for Foreclosure or Sale*, §234.

(*i*) *Bevor v. Luck*, 1867, L.R. 4 Eq. 537; *Loveday v. Chapman*, 1875, 32 L.T. 689.

(*j*) *Parsons v. Bank of Montreal*, 1868, 15 Gr. 411; *Long v. Long*, 1870, 17 Gr. 251. It is therefore prudent to insert in a second mortgage a provision that default under the first mortgage shall in itself constitute default under the second mortgage.

(*k*) *Flint v. Howard*, [1893] 2 Ch. 54, at p. 60.

(*l*) The reversioner or remainderman is not entitled to redeem during the existence of the life tenancy. *Prout v. Cock*, [1896] 2 Ch. 808.

mon (*m*), a person who has entered into a binding and unconditional contract to purchase or take a lease of the equity of redemption or part of it (*n*), a purchaser at a sheriff's sale of a reversion of lands mortgaged for a term of years (*o*), or in execution creditor (*p*), may redeem.

Where a mortgage comprises both real and personal property and after the death of the mortgagor the equity in the real property becomes vested in one person and the equity in the personal property becomes vested in another person, either person may redeem the whole mortgage (*q*).

In every case in which the whole equity is not in the person who redeems, he takes the reconveyance of the mortgaged property subject to the rights of the other persons interested (*r*).

All the owners of the equity of redemption must be made parties to an action for redemption, including purchasers of parts of the mortgaged property, and any of such owners who refuse to join as plaintiffs must be made defendants (*s*). The reason of this rule is that the mortgagee has to account to all

(*m*) *Faulds v. Harper*, 1886, 11 Can. S.C.R. 639; cf. *Smith v. Darling*, 1917, 55 Can. S.C.R. 82, 36 D.L.R. 1. In these two cases several of the tenants in common other than the plaintiffs were barred by lapse of time.

(*n*) *Tasker v. Small*, 1837, 3 My. & Cr. 63; *Pearce v. Morris*, 1869, L.R. 5 Ch. 227; *Tarn v. Turner*, 1888, 39 Ch.D. 456.

(*o*) *Waters v. Shade*, 1851, 2 Gr. 457.

(*p*) *Mildred v. Austin*, 1869, L.R. 8 Eq. 220; *Beckett v. Buckley*, 1874, L.R. 17 Eq. 435; *Cork (Earl of) v. Russell*, 1871, L.R. 13 Eq. 210.

(*q*) *Hall v. Heward*, 1886, 32 Ch.D. 430.

(*r*) *Pearce v. Morris*, 1869, L.R. 5 Ch. 227; *Tarn v. Turner*, 1888, 39 Ch.D. 456. Under the Ontario form of discharge of mortgage, the effect would be the same. See chapter 19, *Discharge or Reconveyance*, §184.

(*s*) *Bolton v. Salmon*, [1891] 2 Ch. 48; *Cholmondeley (Marquis) v. Clinton (Lord)*, 1820, 2 Jac. & W. 1, 134; *Simpson v. Smyth*, 1846, 1 U.C.E. & A. 9, S.C. 1 U.C.E. & A. 172, 5 Gr. 104, 7 Moo. P.C. 205.

the owners of the equity of redemption and he is entitled to account once for all in the presence of all interested parties (*t*).

A mortgagor who has assigned his equity of redemption absolutely (*u*) or who has been foreclosed, is not entitled to redeem, but his right revives if he is sued on his covenant. On payment he is entitled to a reconveyance subject to any right to redeem that may be vested in other persons (*v*). A surety for the mortgage debt in similar circumstances is entitled to redeem (*w*).

§257. *Who must be defendants.*

Every person whose interests may be affected by the accounts to be taken in the action must be brought before the court either as plaintiff or defendant. As already noted, any person who is interested in the equity of redemption and who has not been joined as a plaintiff must be made a defendant.

The holder of the mortgage sought to be redeemed must of course be a defendant, and in case of his dying without having transferred the mortgage the persons entitled on his death must be defendants (*x*).

The mortgagee after assignment and intermediate assignees are not necessary parties unless they have been in possession, and the mortgagor, alleging receipts in excess of the debt, claims personal repayment (*y*).

(*t*) 21 Halsbury, Laws of England, p. 150.

(*u*) See chapter 14, *supra*, *Transferee of the Equity of Redemption*, §132.

(*v*) *Kinnaird v. Trollope*, 1888, 39 Ch.D. 636.

(*w*) *Green v. Wynn*, 1869, L.R. 4 Ch. 201; *Forbes v. Jackson*, 1882, 19 Ch.D. 615, at p. 622; *Standard Realty Co. v. Nicholson*, 1911, 24 O.L.R. 46, at p. 52; *Gee v. Liddell*, [1913] 2 Ch. 62, at p. 75.

(*x*) See chapter 13, *Persons entitled on Death of the Mortgagee*; cf. chapter 21, *Action for Foreclosure or Sale*, §233.

(*y*) *Chambers v. Goldwin*, 1804 9 Ves. 254, at p. 269; *Bickerton v. Walker*, 1885, 31 Ch.D. 151; *Hall v. Heward*, 1886, 32 Ch.D. 430;

Persons claiming or interested in the mortgaged land under the mortgagee, as for instance persons to whom the mortgagee has assumed to convey the land or part of it, must be made defendants (z). Where the mortgagee has sold under the power of sale, it has been held that the purchaser must be made a defendant in a redemption action unless the mortgagor is satisfied with redemption subject to the agreement for sale, as the sale can not be enquired into or set aside if the purchaser is not before the court (a).

The interests of a mortgagee who has priority over the mortgage sought to be redeemed cannot be affected by the accounts taken in the action and he is not usually a proper party to the action. The general rule is that a subsequent mortgagee may make a prior mortgagee a party to his action only for the purpose of redeeming him, but where the prior mortgage was created by a deed absolute in form, the subsequent mortgagee may bring the prior mortgagee before the court for the purpose of showing that his interest is redeemable, without offering to redeem him (b). A subsequent mortgagee in an action brought by him to redeem a prior mortgage may impeach transactions by the prior mortgagee with reference to the mortgaged property and add as defendants purchasers from the prior mortgagee (c).

On the other hand the interests of every mortgagee subsequent to the mortgage sought to be redeemed may be affected

In re Prytherch, *Prytherch v. Williams*, 1889, 42 Ch.D. 590; 21 Halsbury, Laws of England, p. 150.

(z) *McLaren v. Fraser*, 1868, 15 Gr. 239; *Dedford v. Boulton*, 1878, 25 Gr. 561; *Hood v. Easton*, 1856, 2 Jurist N.S. 729.

(a) *Campbell v. Imperial Loan Co.*, 1905, 15 M.R. 614; as to the liability of the mortgagee, if he is unable to reconvey the property, to make compensation to the mortgagor who is entitled to redeem, see *Smith v. Hunt*, 1901, 2 O.L.R. 134, S.C. 4 O.L.R. 653.

(b) *Moore v. Hobson*, 1868, 14 Gr. 703; see also *Rogers v. Lewis*, 1866, 12 Gr. 257.

(c) *McLaren v. Fraser*, 1868, 15 Gr. 239.

by the accounts taken in the action, since the accounts so taken have priority over their rights, and all subsequent encumbrancers must be made parties (*d*).

Where there are several successive mortgagees the owner of the equity may redeem the last one without redeeming any other, but if he wishes to redeem any anterior mortgagee, he must redeem all who are between that mortgagee and himself. A subsequent mortgagee who seeks to redeem a prior mortgagee is in a worse position in this sense, that he is not entitled to do so without foreclosing all persons who are between himself and the ultimate equity of redemption (*e*).

The reason why the mortgagor or other owner of the equity is not entitled to redeem an anterior mortgage without redeeming the intermediate mortgages is that the effect of each successive mortgage of the equity of redemption is to convey to the mortgagee the right to redeem the mortgage immediately above him and that in each case all that is left to the mortgagor is the right to redeem the latest mortgage (*f*). A similar reason applies to a subsequent mortgagee who seeks to redeem a mortgage anterior to the mortgage preceding his, but in addition the subsequent mortgagee is not even the absolute owner of the equity of redemption in the mortgage immediately preceding his, because his own mortgage is subject to redemption, and therefore he must foreclose the owner of the ultimate equity of redemption as a condition of his redeeming any earlier mortgage.

If X has mortgaged Blackacre first to A, then to B and C.

(*d*) Strahan, *Law of Mortgages*, 2nd ed., p. 140; Coote, *Law of Mortgages*, 8th ed., vol. 1, p. 748.

(*e*) *Teevan v. Smith*, 1882, 20 Ch.D. 724, at p. 729. The passage referred to relates to the words "where a mortgagor is entitled to redeem" in s. 3 of the *Mortgages Act*, R.S.O. 1914, c. 112, and is quoted in chapter 20, *Right to Assignment of Mortgage*, §192.

(*f*) See chapter 14, *Transferee of the Equity of Redemption*, §131.

§257. WHO MUST BE DEFENDANTS.

and then to D, the position as regards the parties to an action for redemption may be illustrated as follows (g) :

- (1) X seeks to redeem D. He makes D alone defendant.
- (2) X seeks to redeem B and C. He must make them as well as D defendants, and must offer to redeem D also.
- (3) X seeks to redeem A. He must make A, B and C, and D defendants, and must offer to redeem them all.
- (4) D seeks to redeem B and C. He must make B and C and X defendants, and must claim foreclosure of X.
- (5) D seeks to redeem A. He must make A, B and C and X defendants, and must offer to redeem B and C and claim foreclosure of X.
- (6) B seeks to redeem A. He must make A, X and D defendants, and must claim to foreclose D and X. B takes the estate subject to C's rights.

The principle illustrated by these examples is expressed by the words *redem ap, foreclose de*. In other words, say, the person seeking redemption must redeem all mortgagees above him up to the mortgagee whom he seeks to redeem and must foreclose all persons below him. The owner of the ultimate equity of redemption is the plaintiff.

§258. Writ of summons and interlocutory judgment.

In Ontario the form of endorsement of writs of summons in an action for redemption is as follows :

The plaintiff's claim is to have an account taken of the money, if anything, is due on a mortgage dated [date] between [parties], and to redeem the property comprised in the mortgage.

If there are controverted questions arising between the parties, other than mere matters of accounting, the issues must have to be defined by pleadings or otherwise and the questions will have to be tried according to the ordinary rules of procedure. Judgment will then be entered according to the result of the trial.

(g) Strahan, Law of Mortgages, 2nd ed., pp. 141-142.

(h) On the other hand, in an action for foreclosure or sale, the plaintiff need not join prior mortgagees as parties. See chapter 24, *Action for Foreclosure or Sale*, §234.

of the trial. If the decision is in favour of the mortgagor, the action may then proceed according to the usual practice in mortgage actions as hereinafter outlined.

If, however, no issues are raised which require a trial, judgment may be entered on proceipe or on motion either after default in appearance or after appearance (i).

The form of judgment so entered on proceipe is as follows:

Form of Judgment on proceipe for Redemption.

1. Upon reading the writ of summons issued in this action and an affidavit of service of the said writ, and no appearance having been entered

It is ordered and adjudged that all necessary inquiries be made, accounts taken, costs taxed, and proceedings had for the redemption of the premises in question, and that for this purpose the cause be referred to the Master at

2. And, (subject to the provisions of section 3 of *The Mortgages Act*), it is further ordered and adjudged that upon the plaintiff paying to the defendant what shall be found due to him, or in case nothing shall be found due to the defendant then forthwith after the confirmation of the said Master's report, the defendant do reconvey the said mortgaged premises, and deliver up all documents relating thereto.

3. And it is further ordered and adjudged that in case the plaintiff shall make default in payment as aforesaid of what may be found due to the defendant that the plaintiff's action do stand dismissed out of this Court, with costs to be paid by the plaintiff to the defendant forthwith after taxation thereof.

4. And it is further ordered and adjudged that in case nothing shall be found due from the plaintiff to the defendant that the defendant do pay the plaintiff his costs of this suit forthwith after the taxation thereof, and in case any balance shall be found due from the defendant to the plaintiff that the defendant do pay such balance to the plaintiff forthwith after the confirmation of the Master's report.

The form of paragraph 2 of the judgment is prescribed by rule 519, which further provides that any judgment in general terms shall confer upon the master all the powers given by the

(i) See rules 466 and 467 set out in chapter 24, *Action for Foreclosure or Sale*, §226.

rules and all other powers necessary to enable him to carry the judgment into full effect.

§259. *Proceedings in the master's office.*

It is provided by rules 480 and 481 as follows:

480. Upon a reference under a judgment for redemption, the master shall, without any special direction, take an account of what is due to the defendant for principal money and interest, and his costs shall be taxed, and a time and place for payment appointed.

481. Where the judgment is for redemption or foreclosure, or redemption or sale, such proceedings are in such case to be thereupon had, and with the same effect as in an action for foreclosure or sale, and in such case the encumbrancer shall be treated as the owner of the equity of redemption.

The time allowed to the plaintiff in a redemption action under the ordinary form of judgment will be the same as is usually allowed to the first encumbrancer, (or if there are no subsequent encumbrancers, to the owner of the equity of redemption), in a foreclosure action, namely, six months (*j*). In the redemption action, however, the plaintiff, who will usually be the owner of the ultimate equity of redemption, has the first opportunity to redeem and on default will be the first to be foreclosed. In case of his default the last encumbrancer will, **for the purpose of subsequent proceedings**, be treated as the owner of the equity of redemption.

It is provided by rule 487 as follows:

487. In a redemption action, on default of payment being made according to the report, the defendant shall be entitled, on an *ex parte* application, to a final order of foreclosure against the plaintiff, or to an order dismissing the action with costs to be paid by the plaintiff.

(*j*) As to the general conduct of the reference, the taking of the account, the taxing of costs and the appointment of a time and place for redemption, see chapter 24, *supra*, *Action for Foreclosure or Sale*, §§237 ff. See also chapter 27, *Accounting between Mortgagor and Mortgagee*. For form of report under a judgment for redemption, see *Henderson & Kingston, Forms and Precedents*, 2nd ed., no. 1077.

The time allowed to the plaintiff for redemption will not ordinarily be enlarged (*k*), but it may be enlarged if the failure to pay the mortgage money within the time appointed was due to mistake. If the application to extend the time is not made until after final order, that order must be vacated before the time is extended (*l*).

A final decree dismissing an action for the redemption of a legal mortgage operates as a decree for foreclosure (*m*). But the dismissal of a redemption action for want of prosecution has not the effect of a decree for foreclosure, and the mortgagor may bring another action for redemption (*n*). The dismissal of an action for the redemption of an equitable mortgage by deposit of title deeds is not equivalent to a foreclosure, because in that case the judgment of foreclosure would direct the execution of a conveyance and the mere dismissal of the action to redeem would not have that effect (*o*). Where a second mortgagee brings action to redeem the first mortgagee and to foreclose the mortgagor, and the second mortgagee fails to redeem, the action will be dismissed as against both the second mortgagee and the mortgagor with costs (*p*).

Rule 488 is as follows:

188. In a redemption action where the plaintiff is declared foreclosed, directions may be given either by the final order foreclosing the plaintiff, or by subsequent orders, that all necessary inquiries be made, accounts taken and proceedings had for redemption or foreclosure, or redemption or sale, as against any subsequent encumbrancers, or for the adjustment of the relative rights and liabilities of the original defendants as among themselves.

(*k*) *Faulkner v. Bolton*, 1835, 7 Sim. 319.

(*l*) *Collinson v. Jeffery*, [1896] 1 Ch. 644. As to extension of time for redemption in an action for foreclosure or sale, see chapter 21, §214.

(*m*) *Cholmley v. Countess Dowager of Oxford*, 1741, 2 Atk. 267; *Bishop of Winchester v. Paine*, 1805, 11 Ves. 194; *Inman v. Wearing*, 1850, 3 DeG. & S. 729; *Cornwall v. Henriad*, 1866, 12 Gr. 338.

(*n*) *Hansard v. Hardy*, 1812, 18 Ves. 455.

(*o*) *Marshall v. Shrewsbury*, 1875, L.R. 10 Ch. 250.

(*p*) *Hallett v. Furze*, 1885, 31 Ch.D. 312.

Where a second mortgagee sues for redemption and makes default in paying at the time appointed either the mortgagor or the first mortgagee has the right to have a day appointed for redemption of the first mortgage by the mortgagor. If neither avails himself of this right and the first mortgagee obtains an order simply dismissing the second mortgagee's action, he will not be deprived of his costs of a subsequent action to foreclose the first mortgage (*q*).

In an action for redemption the plaintiff is not entitled, without the mortgagee's consent, to a sale, but if the mortgagee under rule 481 brings in subsequent encumbrancers for the purpose of foreclosing them, it would seem that they have the ordinary right of defendants in a foreclosure action and may claim a sale on the usual terms (*r*).

A subsequent encumbrancer bringing action against a prior mortgagee is not entitled to a sale (*s*), unless the prior mortgagee consents or does not object (*t*). A subsequent encumbrancer may, however, have judgment for sale if the prior mortgagee consents thereto or does not object; but in that case the proceeds of the sale will be applied in satisfaction of the claims of the encumbrancers according to their priorities, and the subsequent encumbrancer will not be entitled to any priority in respect of his costs even if the fund prove insufficient (*u*).

(*q*) *McKinnon v. Anderson*, 1871, 18 Gr. 684. As to subsequent accounts and appointment of a new day for redemption, see chapter 24, *Action for Foreclosure or Sale*, §241.

(*r*) *Holmsted*, Ontario Judicature Act, 4th ed., p. 1071; see chapter 24, *Action for Foreclosure or Sale*, §245, and rule 462 there quoted.

(*s*) *McDougall v. Campbell*, 1881, 6 Can. S.C.R. 502.

(*t*) *Grange v. Barber*, 1868, 2 Chy. Ch. (Ont). 189.

(*u*) *Grange v. Barber*, *supra*.

CHAPTER XXVI.

LIMITATION OF ACTIONS.

A. *Personal Actions for Payment.*

- §261. Covenant, debt and account, p. 515.
- §262. Disability or absence, p. 517.
- §263. Acknowledgment or part payment, p. 518.

B. *Actions to recover Money out of Land.*

- §264. Limitation as to principal, p. 522.
- §265. Acknowledgment or part payment, p. 525.
- §266. Limitation as to arrears of interest, p. 527.
- §267. Acknowledgment, p. 531.

C. *Actions for Possession and Foreclosure or Sale.*

- §268. Limitation prior to 1833, p. 532.
- §269. The Real Property Limitation Acts, p. 534.
- §270. Action to recover land, p. 535.
- §271. When the right is deemed to accrue, p. 539.
- §272. Acknowledgment, p. 545.
- §273. Part payment, p. 548.
- §274. Effect of bringing action, p. 550.
- §275. Disabilities in case of action to recover land, p. 553.
- §276. Extinguishment of right and title, p. 555.

D. *Actions for Redemption.*

- §277. Limitation if mortgagee in possession, p. 557.
- §278. Time not extended by reason of disability, p. 559.
- §279. Nature of possession of mortgagee, p. 561.
- §280. Possession of part of mortgaged land, p. 564.
- §281. Acknowledgment of title by mortgagee, p. 565.

E. *The Land Titles Acts.*

- §282. Possession adverse to registered title, p. 568.

A. PERSONAL ACTIONS FOR PAYMENT.

§261. *Covenant, debt and account.*

If there is a covenant for payment the limitation of action upon it is governed in Ontario by the Limitations Act, R.S.O. 1914, c. 75, s. 49, as follows:

49.—(1) The following actions shall be commenced within and not after the times respectively hereinafter mentioned:

- (a) An action for rent, upon an indenture of demise;
 - (b) An action upon a bond, or other specialty, except upon a covenant contained in an indenture of mortgage made on or after the 1st day of July, 1894;
 - (c) An action upon a recognizance;
- within twenty years after the cause of action arose.
- (k) An action upon a covenant contained in an indenture of mortgage, made on or after the 1st day of July, 1894, within ten years after the cause of action arose.

Clause (k) and the corresponding exception in clause (b) were introduced in Ontario by the statute 56 V. c. 17, but in other respects the foregoing provisions are derived from the English statute 3 & 4 W. 4, c. 42, s. 3, adopted in Upper Canada by the statute 7 W. 4, c. 3, s. 3.

The period of limitation of actions to recover money out of the land is ten years (a) and only six years arrears of interest may be so recovered (b). The section now in question is confined to the personal action on the covenant for payment. It has been held, in the case of mortgages made before the 1st of July, 1894, that the action on the covenant for payment is not barred until after twenty years although the right to resort to the land may have been already barred, and similarly that in an action on the covenant arrears of interest up to twenty years may be recovered, although only six years arrears may be recovered out of the land (c). It follows that

(a) R.S.O. 1914, c. 75, s. 24. See §264, *infra*.

(b) R.S.O. 1914, c. 75, s. 18. See §266, *infra*.

(c) *Airey v. Mitchell*, 1874, 21 Gr. 510, at p. 512; *McDonald v. Elliott*, 1886, 12 O.R. 98; following *Allan v. McTavish*, 1878, 2 O.A.R.

in the case of mortgages made on or after the 1st day of July, 1894, a personal judgment on the covenant may be recovered for ten years arrears of interest, although only six years arrears may be recovered out of the land. In Ontario any charge or transfer of land registered under the Land Titles Act may be duly made by an instrument not under seal, and if so made the instrument and every agreement, stipulation and condition therein shall have the same effect for all purposes as if it were made under seal (*d*). A contract to pay the mortgage money expressed or implied in such charge is therefore a "covenant contained in an indenture of mortgage" within the meaning of s. 49 of the Limitations Act (*c*).

An action for debt grounded upon any lending or contract without specialty must be brought within six years after the cause of action arose (*f*). Therefore if a mortgage contains no covenant to pay and the mortgagor is nevertheless personally liable to the mortgagee (*g*), the mortgagee is entitled to recover from the mortgagor only six years arrears of interest, and the personal remedy by action to recover either principal or interest will be barred in six years (*h*).

The limitation of actions for account is governed in Ontario by R.S.O. 1914, c. 75, s. 50, as follow :

50. Every action of account, or for not accounting, or for such accounts as concern the trade of merchandise between merchant and merchant, their factors and servants, shall be commenced within six years after the cause of action arose; and no claim in respect of a

278, in preference to *Sutton v. Sutton*, 1882, 22 Ch.D. 511, 16 R.C. 298. See §264, below.

(*d*) R.S.O. 1914, c. 126, s. 102.

(*c*) *Beatty v. Bailey*, 1912, 26 O.L.R. 145, 3 D.L.R. 831.

(*f*) R.S.O. 1914, c. 75, s. 49 (1) (*g*): 21 Jac. 1, c. 16, s. 3 (1623).

(*g*) As to the personal liability of the mortgagor in the absence of a covenant to pay, see chapter 23, *Action on the Covenant*, §221.

(*h*) The period is still governed in England by 21 Jac. 1, c. 16, and it has not been enlarged by the Real Property Limitation Acts. *Barnes v. Glenton*, [1899] 1 Q.B. 885.

matter which arose more than six years before the commencement of the action, shall be enforceable by action by reason only of some other matter of claim comprised in the same account, having arisen within six years next before the commencement of the action.

This section is derived from the English Mercantile Law Amendment Act, 1856, 19 & 20 V. c. 97, s. 9 (*i*).

If a mortgagee sells under a power of sale according to the terms of which he is declared to be a trustee of the surplus, the statute of limitations does not apply to an action by the mortgagee to make the mortgagee account for the surplus (*j*), but if by the terms of the mortgage the mortgagee is not expressly declared to be a trustee of the surplus, he is merely a constructive trustee and the period of limitation is six years (*k*).

§262. *Disability or absence.*

Disability on the part of the plaintiff, or absence from Ontario on the part of the defendant, is provided for by R.S.O. 1914, c. 75, ss. 51 and 52, as follows:

51. Where a person entitled to bring any action mentioned in either of the next two preceding sections is at the time the cause of action accrues an infant, idiot, lunatic, or of unsound mind, the period within which such action should be brought shall be reckoned from the date when such person became of full age or of sound mind.

52. If a person against whom any cause of action mentioned in sections 49 and 50 accrues is at such time out of Ontario, the person entitled to the cause of action may bring the action within such times as are before limited after the return of the absent person to Ontario.

(*i*) See *Friend v. Young*, [1897] 2 Ch. 421, 16 R.C. 193.

(*j*) *Biggs v. Freehold Loan and Savings Co.*, 1899, 26 O.A.R. 232, reversed on another point, 1901, 31 Can. S.C.R. 136; *In re Allison Johnson v. Mounsey*, 1879, 11 Ch.D. 284; *In re Bell, Lake v. Bell*, 1886, 34 Ch.D. 462; *Thorne v. Heard*, [1895] A.C. 495. As to the application of the Limitations Act to an "express trust," see also §264. *infra*.

(*k*) *Locking v. Parker*, 1872, L.R. 8 Ch. 30; *Banner v. Berridge*, 1881, 18 Ch.D. 254.

These two sections are derived from the English statutes 21 Jac. 1, c. 16, s. 7, and 4 & 5 Anne, c. 3, (or c. 16 in Ruffhead's edition), s. 19, respectively. See R.S.O. 1897, c. 324, ss. 39 and 40. Under the statute of James time was extended also in the case of the plaintiff being a *feme covert*, imprisoned or beyond the seas.

The case of one joint debtor or contractor being out of Ontario, is provided for by R.S.O. 1914, c. 75, s. 53, as follows:

53.—(1) Where a person has any such cause of action against joint debtors or joint contractors he shall not be entitled to any time within which to commence such action against any one of them who was within Ontario at the time the cause of action accrued, by reason only that some other of them was, at the time the cause of action accrued, out of Ontario.

(2) The person having such cause of action shall not be barred from commencing an action against a joint debtor or joint contractor who was out of Ontario at the time the cause of action accrued, after his return to Ontario, by reason only that judgment has been already recovered against a joint debtor or joint contractor who was at such time within Ontario.

§263. *Acknowledgment or part payment.*

Provision is made as to the effect of an acknowledgment or part payment by R.S.O. 1914, c. 75, s. 54 to 59, as follows:

54. Where an acknowledgment in writing, signed by the principal party or his agent, is made by a person liable upon an indenture, specialty or recognizance, or where an acknowledgment is made by such person by part payment, or part satisfaction, on account of any principal or interest due on such indenture, specialty or recognizance, the person entitled may bring an action for the money remaining unpaid and so acknowledged to be due, within twenty years, or, in the cases mentioned in clause (k) of subsection 1 of section 49, within ten years after such acknowledgment in writing, or part payment, or part satisfaction, or where the person entitled is, at the time of the acknowledgment under disability as aforesaid, or the person making the acknowledgment is, at the time of making the same, out of Ontario, then within twenty years, or in the cases aforesaid within ten years, after the disability has ceased, or the person has returned, as the case may be.

55.—(1) No acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract whereby

to take out of the operation of this Part (1), any case falling within its provisions respecting actions

(a) Of account and upon the case,

(b) On simple contract or of debt grounded upon any lending or contract without specialty, and

(c) Of debt for arrears of rent,

or to deprive any party of the benefit thereof, unless such acknowledgment or promise is made or contained by or in some writing signed by the party chargeable thereby, or by his agent duly authorized to make such acknowledgment or promise.

(2) Nothing in this section shall alter, take away or lessen the effect of any payment of any principal or interest by any person.

56. Where there are two or more joint debtors or joint contractors, or joint obligors, or covenantors, or executors or administrators of any debtor or contractor, no such joint debtor, joint contractor, joint obligor or covenantor or executor or administrator shall lose the benefit of this Act so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed, or by reason of any payment of any principal or interest made, by any other or others of them.

57. In actions commenced against two or more such joint debtors, joint contractors, executors or administrators, if it appears at the trial or otherwise that the plaintiff, though barred by this Act, as to one or more of such joint debtors, joint contractors, or executors or administrators is nevertheless entitled to recover against any other or others of the defendants by virtue of a new acknowledgment, promise or payment, judgment shall be given for the plaintiff as to the defendant or defendants against whom he recovers, and for the other defendant or defendants against the plaintiff.

58. No endorsement or memorandum of any payment written made upon any promissory note, bill of exchange, or other writing, by or on behalf of the person to whom the payment has been made, shall be deemed sufficient proof of the payment, so as to take the case out of the operation of this Act.

59. This Part shall apply to the case of any claim of the nature hereinbefore mentioned, alleged by way of set-off on the part of any defendant.

S. 54 relates to action upon an indenture, specialty or recognizance. The special provision as to clause (k) of sub-s. 1 of s. 49 refers to an amendment made in the Ontario statute

(1) This "part" includes ss. 49 to 59 of the statute.

in 1894 (*m*). In other respects s. 54 is derived from the English statute 3 & 4 W. 4, c. 42, s. 5.

S. 55, relating to actions of account, on simple contract or of debt without specialty, is derived from the English statute 9 G. 4, c. 14, s. 1.

S. 56 is derived from the English statute 19 & 20 V. c. 97, s. 14.

The acknowledgment of a simple contract debt to take the case out of the statute 21 Jac. 1, c. 16, must be an acknowledgment from which the law will imply a promise to pay (so as to give rise to a new cause of action), and part payment, to have the same effect, must be such a payment that a like promise to pay the remainder may be implied and must be a payment in discharge *pro tanto* of the debt (*n*). The acknowledgment by writing or part payment under s. 54, *supra*, however need not be such that a promise to pay is implied, and the acknowledgment could not operate as giving rise to a new cause of action, because the action in which the acknowledgment is to be operative must be maintained on the original obligation, and on that only (*o*).

An acknowledgment of a simple contract debt must be made to the creditor or his agent, but it has been held that an acknowledgment of indebtedness made in a letter written after the creditor's death to the person who is entitled to administer the creditor's estate, and who after the receipt of the letter is appointed administrator, is sufficient (*p*). In the case of a specialty debt an acknowledgment to a third party is sufficient (*q*).

(*n*) See §261, *supra*.

(*o*) *Tanner v. Smart*, 1827, 6 B. & C. 603, 16 R.C. 160; *Stamford Spalding and Boston Banking Co. v. Smith*, [1892] 1 Q.B. 765, 16 R.C. 17.

(*p*) *Roddam v. Morley*, 1857, 1 D.G. & J. 1, 16 R.C. 273.

(*q*) *Robertson v. Barrill*, 1895, 22 O.A.R. 356.

(*r*) *Goodrich v. Doyce*, 1899, 14 O.A.R. 528.

S. 54 does not expressly require the payment to be made by the person liable or his agent. If such a qualification of the statute is to be implied, the assignee of the equity of redemption who assumes the mortgage is sufficiently an agent of the mortgagor for that purpose (*r*).

The payment of interest on a specialty debt by a tenant for life is sufficient to create a new starting point under the statute as against the remaindermen (*s*). The same principle applies in the case of payment of interest on a simple contract debt (*t*).

The receipt of rents by a mortgagee in possession is not a payment by the mortgagor or any person on his behalf so as to keep alive the right of action on the covenant, unless by agreement between the parties rents are to be set off against money due on the mortgage (*u*).

A written acknowledgment or a payment by one of two or more joint debtors or joint covenantors will not deprive the other or others of them of the benefit of the statute (*v*).

(*r*) *Forsyth v. Bristowe*, 1853, 8 Exch. 716; *Dibb v. Walker*, [1893] 2 Ch. 429. As to payment by a receiver appointed by the mortgagee pursuant to a power contained in the mortgage, see *In re Hale*, *Lilley v. Foad*, [1899] 2 Ch. 107.

(*s*) *Roddam v. Morley*, 1857, 1 DeG. & J. 1, 16 R.C. 273; *Dibb v. Walker*, *supra*.

(*t*) *In re Hollingshead*, *Hollingshead v. Webster*, 1888, 37 Ch.D. 671.

(*u*) *Cockburn v. Edwards*, 1881, 18 Ch.D. 449; *Stark v. Somerville*, 1917, 40 O.L.R. 374, affirmed, 1918, 41 O.L.R. 591, 41 D.L.R. 496. See also *Harlock v. Ashberry*, 1882, 19 Ch.D. 539, and other cases cited on the question of part payment under s. 24 (recovery of money out of land) and s. 23 (action to recover land) in §§265 and 273.

(*v*) R.S.O. 1914, c. 75, s. 56, *supra*; *Paxton v. Smith*, 1889, 18 O.R. 178. The provision just referred to applies, however, only to acknowledgment or payment under ss. 54 and 55, not to acknowledgment or payment under s. 24 (§265, *infra*) or under ss. 14 and 15 (§§272, 273, *infra*). *Levin v. Wilson*, 1886, 11 App. Cas. 639, at

B. ACTION TO RECOVER MONEY OUT OF LAND.

§264. *Period of limitation as to principal.*

A limitation of actions or other proceedings to recover sums of money secured by mortgage or lien or otherwise charged upon or payable out of any land or rent was imposed in England by the Real Property Limitations Act of 1833 (3 & 4 W. 4, c. 27) s. 40. This section was superseded by the statute of 1874 (37 & 38 V. c. 57) s. 8, by which the period of limitation was reduced from twenty to twelve years. The English statute of 1833 was adopted in Upper Canada in 1834 as 4 W. 4, c. 1, s. 43, and by 38 V. c. 16, s. 11, the period was reduced to ten years (*w*). The corresponding provision in Ontario is the Limitations Act, R.S.O. 1914, c. 75, s. 24, as follows:

24.—(1) No action shall be brought to recover out of any land or rent any sum of money secured by any mortgage or lien, or otherwise charged upon or payable out of such land or rent, or to recover any legacy, whether it is or is not charged upon land, but within ten years next after a present right to receive the same accrued to some person capable of giving a discharge for, or release of the same, unless in the meantime some part of the principal money or some interest thereon has been paid, or some acknowledgment in writing of the right thereto signed by the person by whom the same is payable, or his agent, has been given to the person entitled thereto or his agent; and in such case no action shall be brought but within ten years after such payment or acknowledgment, or the last of such payments or acknowledgments if more than one, was made or given.

(2) Notwithstanding the provisions of subsection 1, a lien or charge created by the placing of an execution or other process against land in the hands of the sheriff, or other officer to whom it is directed, shall remain in force so long as such execution or other process remains in the hands of such sheriff or officer for execution and is kept alive by renewal or otherwise.

The words "out of any land or rent" in the first and second lines of the section are not in the English statute. They

pp. 646, 647; *In re Frisby, Allison v. Frisby*, 1889, 43 Ch.D. 166. As to the acknowledgment by one of several mortgagees in the case of an action to redeem, see §281, *infra*.

(*w*) Cf. §269, *infra*.

were introduced into the Ontario statute in 1887 (*x*) and were apparently intended to confirm the construction placed upon the statute in Ontario, namely, that a personal action on the covenant was governed by the predecessor of s. 49 (*y*) and that it was only an action to recover money out of the land that was governed by s. 24 (*z*). In England, on the contrary, it has been held that the provision of the English statute corresponding to s. 24 applies also to an action on the covenant (*a*).

"Action" is defined by s. 2 as including any civil proceeding, and a sale under the power of sale contained in a mortgage is a "proceeding" under s. 24, which the mortgagee or his assignee is precluded from taking after the lapse of ten years (*b*).

An action for foreclosure is not within s. 24, but is an action to recover land within s. 5 (*c*).

It was held that the right of an execution creditor under a writ of *fieri facias* in the hands of the sheriff of the county in which the lands of the debtor are situate is a "lien," the money mentioned in the writ is "money charged upon land," and taking steps to sell under the writ is a "proceeding." Therefore if a writ had been more than ten years in the

(*x*) R.S.O. 1887, c. 111, s. 23.

(*y*) See §261, *supra*.

(*z*) McDonald v. Elliott, 1886, 12 O.R. 98, following Allan v. McTavish, 1878, 2 O.A.R. 278.

(*a*) Sutton v. Sutton, 1882, 22 Ch.D. 511, 16 R.C. 298; cf. Kirkland v. Peatfield, [1903] 1 K.B. 756. Sutton v. Sutton was distinguished in *In re Powers*, Lindsell v. Phillips, 1885, 30 Ch.D. 291; see also *In re Frisby*, Allison v. Frisby, 1889, 43 Ch.D. 106, as to an action against a surety, not the mortgagor. The decision in Sutton v. Sutton applies to an action on the covenant, not to a simple contract debt. Barnes v. Glenton, [1899] 1 Q.B. 885.

(*b*) McDonald v. Grundy, 1904, 8 O.L.R. 113; cf. Smith v. Brown, 1890, 20 O.R. 165.

(*c*) See §270, *infra*.

sheriff's hands, and no payment or acknowledgment had in the meantime been made or given, the lien was gone and the proceeding would be restrained (*d*). In 1905, however, by 5 E. 7, c. 13, s. 10, the section was amended by the addition of a proviso which is now reproduced in altered form in sub-sec. 2. An action on the judgment of a court of record is barred after the expiration of twenty years (*e*).

The words "present right to receive" are to be read according to their ordinary meaning in the English language, and the statute runs from the time at which the charge upon the land comes into existence, not from that at which the right to sue arises (*f*).

It is provided by R.S.O. 1914, c. 75, s. 25, as follows:

25 No action shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent, and secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust.

This section is derived from the English statute 37 & 38 V. c. 57, s. 10, adopted in Ontario in 1874 by 38 V. c. 16, s. 13. The effect of the section when originally enacted was to modify slightly the equitable rule that no claim of a *cestui que trust* against his trustee for any property held upon an express trust or in respect of the breach of such trust should be held to be barred by any statute of limitations (*g*). The law as to the effect of lapse of time on a claim against a trustee was changed in England in 1888 by a statute which was adopted in Ontario in 1891 (*h*), but the amending statute

(*d*) *Nell v. Abmond*, 1897, 29 O.R. 63. This decision was followed in *In re Woodall*, 1904, 8 O.L.R. 288.

(*e*) *Butler v. McMicken*, 1900, 32 O.R. 422.

(*f*) *In re Owen*, [1894] 3 Ch. 220, at p. 225; *Hornsey Local Board v. Menarch Investment Building Society*, 1889, 21 Q.B.D. 1.

(*g*) Underhill, *Law of Trusts*, 7th ed., p. 486.

(*h*) See now R.S.O. 1914, c. 75, ss. 46, 47 and 48.

is subject to some important exceptions, and in some circumstances the old equitable rule may still govern (*l*).

§265. *Acknowledgment or part payment.*

In the case of an action to recover money out of land an acknowledgment, in order to create a new starting point from which time will run, must be given in writing signed by the person by whom the money is payable or his agent to the person entitled thereto or his agent (*g*).

The words "by the person by whom the same is payable or his agent," used in the statute with reference to an acknowledgment, are governed by the word "signed" and cannot grammatically be read as referring also to a part payment. It has, however, been held that the principle underlying the statutes of limitation is that a payment, in order to create a new starting point, must be a payment by a person liable, as an acknowledgment of right. A payment under this section must be a payment of principal or interest and must be made by the mortgagor or his agent, or at least by a person bound or entitled to make a payment of principal or interest for the mortgagor (*h*). A payment of rent made by a tenant of the mortgaged property to the mortgagee pursuant to a notice by the mortgagee requiring the rent to be paid to him is not such a payment. It is not a payment of principal or interest, but a payment of rent. It is merely one item chargeable against the mortgagee in the account between him and the mortgagor—an account which may contain many items, e.g., for re-

(*l*) As to what is an "express trust" within the meaning of the old rule, see review of cases in *Taylor v. Davies*, 1917, 41 O.L.R. 403.

(*g*) R.S.O. 1914, c. 75, s. 24. See §264, *supra*. Compare the terms of s. 14 as to the acknowledgment required in order to create a new starting point in the case of an action to recover land. See §272.

(*h*) As was the receiver in the case of *Chinnery v. Evans*, 1864, 11 H.L.C. 115.

pairs, expenses, etc., to the credit of the mortgagee besides principal and interest. It is not a payment by a person liable to pay principal or interest, and cannot therefore amount to an acknowledgment of liability on the mortgage or to an admission of the mortgagee's right (*i*).

If, however, the holder of a mortgage upon land is also entitled to the rents and profits of the land, for instance, as life tenant, he is deemed to pay himself out of the rents and profits, and his receipt of the rents will be sufficient payment to prevent the statute from running (*j*).

The solicitor who acted for a mortgagor, and after his death for his executors, and also for the mortgagees, paid the interest upon the mortgage to the mortgagees regularly up to a time within the statutory period before the commencement of an action to enforce the mortgage. It was held this was *prima facie* a payment "by the person by whom the same shall be payable" so as to throw on the representatives of the mortgagor the onus of proving that the statute had run and that the mortgage debt had not been kept alive. It was also held that the payment of interest by a person who, as between himself and the mortgagor, was bound to pay it, though he was under no contract with the mortgagee to do so, was a payment "by the person by whom the same shall be payable" so as to interrupt the running of the statute (*k*).

A payment made by a purchaser of the equity of redemption who is bound as between himself and the mortgagor to pay is sufficient to prevent the statute from running in favour of the mortgagor (*l*).

(*i*) *Harlock v. Ashberry*, 1882, 19 Ch.D. 539; cf. *McDonald v. Grundy*, 1904, 8 O.L.R. 113, at pp. 115, 116.

(*j*) *Burrell v. Earl of Egremont*, 1844, 7 Beav. 205; *Topham v. Booth*, 1887, 35 Ch.D. 607; *Currie v. Currie*, 1910, 20 O.L.R. 375.

(*k*) *Bradshaw v. Widdrington*, [1902] 2 Ch. 430, in which *Harlock v. Ashberry*, *supra*, was considered and explained.

(*l*) See §272, *infra*; *Trust and Loan Co. v. Stevenson*, 1892, 20

Payment of interest by the specific devisee of part of a testator's real estate which was subject to a mortgage created by the testator was held to be sufficient to keep the mortgagee's right of action alive against the specific devisees of other parts of the real estate which were not subject to the mortgage and thus entitle the mortgagee to an order for administration of the whole of the testator's real estate (*m*).

The provision of s. 56 of the Limitations Act (*n*) by which no joint debtor or covenantor is to lose the benefit of the statute by reason only of an acknowledgment or payment made by another joint debtor or covenantor applies only to an acknowledgment or payment under ss. 54 and 55, not to an acknowledgment or payment under ss. 14 and 23 (*o*) or under s. 24 (*p*).

The acknowledgment or payment under s. 24 must be given or made "in the meantime," that is to say, before the statutory period has run (*q*).

§266. *Limitation as to arrears of interest.*

The amount of arrears of interest which may be recovered out of the land is governed by R.S.O. 1914, c. 75, s. 18, as follows:

O.A.R. 66; *Ross v. Schmitz*, 1913, 6 S.L.R. 131, 14 D.L.R. 648. See also cases on a similar point under s. 54 (§263).

(*m*) In *re Lacey*, *Howard v. Lightfoot*, [1907] 1 Ch. 330; cf. *Ames v. Mannering*, 1859, 26 Beav. 583 (payment by dowress); *Chinery v. Evans*, 1864, 11 H.L.C. 115 (payment by owner of equity in one of several parcels subject to same mortgage); *McKay v. Hutchings*, 1917, 41 O.L.R. 46, (payment by one of the heirs of the mortgagor).

(*n*) See §263, *supra*.

(*o*) See §§272, 273, *infra*.

(*p*) *Lewin v. Wilson*, 1886, 11 App. Cas. 639, at pp. 646, 647; In *re Frisby*, *Allison v. Frisby*, 1889, 43 Ch.D. 106. It was held in the latter case that under s. 24 a payment by the mortgagor interrupted the running of the statute in favour of a surety.

(*q*) See the cases cited as to acknowledgment under s. 20 in §281, *infra*.

18. (1) No arrears of rent, or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, whether it is or is not charged upon land, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, or action, but within six years next after the same respectively has become due, or next after any acknowledgment in writing of the same has been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent.

(2) This section shall not apply to an action for redemption brought by a mortgagor or any person claiming under him.

Sub-sec. 1 is derived from the English statute 3 & 4 W. 4, c. 27, s. 42, adopted in Upper Canada by 4 W. 4, c. 1, s. 45. Sub-sec. 2 was added to the Ontario statute in 1910.

Money to arise from the sale of land is within this section. Where a married woman entitled, after the death of a tenant for life, to a share of a fund arising from the proceeds of lands devised upon trust for sale, joined with her husband in a mortgage, by deed acknowledged, of her reversionary estate, it was held that the wife's estate was "money payable out of land" and that the mortgagee could not recover more than six years arrears of interest (*u*). But in the case of a mortgage of personally or of a reversionary interest in a sum of money secured by mortgage, the mortgagee is not restricted to six years arrears.

The proceeds of the sale of mortgaged premises, sold under the power of sale in a mortgage by the trustees of the mortgagee, were paid into court in a suit for the administration of the mortgagee's estate. There being nearly twenty years arrears of interest due on the mortgage, exceeding in amount the fund in court, the trustees petitioned for payment out of the fund to satisfy such arrears, and the assignee of the mortgagor was served with the petition. It was held that the petition was

(u) *Bowyer v. Woodman*, 1867, L.R. 3 Eq. 313.

(v) *Smith v. Hall*, 1878, 9 Ch.D. 143; *Mellersh v. Brown*, 1890, 45 Ch.D. 225.

not a suit to recover arrears of interest within the section, and therefore that the mortgagee's trustees were not limited to six years arrears, and the fund was ordered to be paid over to them (*w*). If, however, proceedings for sale are commenced, the sale can be stopped by the payment of the amount legally owing, and in the case of a person interested in the equity of redemption other than the mortgagor or his personal representative the interest included in such amount would be limited to six years arrears (*x*).

It was held at an early date that a foreclosure suit was within the statute, notwithstanding the argument that the suit was not to recover money but to foreclose the equity of redemption (*y*). On this point the decision has never since been called in question, but the case has in effect been overruled in so far as it decided that a mortgagee in a foreclosure suit was entitled, notwithstanding the statute, to charge the mortgaged estate with full arrears of interest (*z*). The result of the authorities is that no more than six years' arrears of interest can be recovered out of the land, although in an action upon the covenant arrears of interest for ten years can be recovered (*a*).

Where no encumbrancer intervened between the mortgagor and mortgagee, it was held that the mortgagee was entitled to full arrears of interest, on the ground that, even if he was entitled to only six years' arrears by way of specific charge upon the land, he might recover the rest of the arrears on the

(*w*) *Edmunds v. Waugh*, 1866, L.R. 1 Eq. 418, 16 R.C. 291. See also *In re Marshfield*, *Marshfield v. Hutchins*, 1887, 34 Ch.D. 721; *In re Lloyd*, *Lloyd v. Lloyd*, [1903] 1 Ch. 385 (where the decisions are reviewed); *Ford v. Allen*, 1869, 15 Gr. 565.

(*x*) *McMicking v. Gibbons*, 1897, 24 O.A.R. 586, at p. 592.

(*y*) *DuVigier v. Lee*, 1843, 2 Hare 326.

(*z*) *Hunter v. Nockolds*, 1850, 1 Mac. & G. 640.

(*a*) *Airey v. Mitchell*, 1874, 21 Gr. 510, at p. 512 (twenty years in the case of a mortgage made before the 1st of July, 1894: see s. 49, in §261, *supra*).

covenant and could obtain a lien on the land by placing a writ of execution in the sheriff's hands (*b*). The decision as applied to the foreclosure action is, however, open to serious question because the effect is to add the excess over six years' arrears to the price of redemption, and thus, as to the excess, to deprive the execution debtor of a portion of the twelve months which the law allows him for paying so far as his lands are concerned. The decision as applied to a redemption action was formerly open to the same objection.

In a foreclosure action it is clear that if encumbrances intervene between the mortgagor and the mortgagee, the latter cannot as against the subsequent encumbrancers claim more than six years' arrears against the land, although he may be entitled to judgment and execution against the mortgagor on the covenant. In a redemption action on the other hand it was held (*c*) that the mortgagee was entitled to full arrears even as against subsequent encumbrancers, on the ground that the statute applied only to a case where the mortgagee by action was seeking to enforce payment. This decision was overruled on this point in an action for redemption by a second mortgagee against a first mortgagee, the mortgagor not being a party—on the principle that the price of redemption is the same as that of foreclosure (*d*). The last mentioned decision has been overruled by the amendment of the statute now embodied in sub-s. 2 of s. 18.

(*b*) *Howeren v. Bradburn*, 1875, 22 Gr. 96 (a redemption suit under the Administration of Justice Act, 1873); *Macdonald v. Macdonald*, 1886, 11 O.R. 187 (a foreclosure action under the Judicature Act).

(*c*) *DeLaney v. Canadian Pacific Ry. Co.*, 1890, 21 O.R. 11; see also *British Canadian Loan and Agency Co. v. Farmer*, 1904, 15 M. R. 593.

(*d*) *McMicking v. Gibbons*, 1897, 24 O.A.R. 586; see also *Dingle v. Coppen*, [1899] 1 Ch. 726; *In re Lloyd, Lloyd v. Lloyd*, [1903] 1 Ch. 287.

The case of a prior mortgagee having been in possession within one year before action is brought by a subsequent mortgagee is provided for by R.S.O. 1914, c. 75, s. 19, as follows:

19. Where any prior mortgagee or other encumbrancer has been in possession of any land, or in receipt of the profits thereof, within one year next before an action is brought by any person entitled to a subsequent mortgage or other encumbrance on the same land, the person entitled to such subsequent mortgage or encumbrance may recover in such action the arrears of interest which have become due during the whole time that such prior mortgagee or encumbrancer was in such possession or receipt, although such time may have exceeded such term of six years.

This section is derived from the English statute 3 & 4 W. 4, c. 27, s. 42, adopted in Upper Canada by 4 W. 4, c. 1, s. 45.

§267. *Acknowledgment.*

An acknowledgment which under s. 18 of the Limitations Act will afford a new starting point for the period of limitation applicable to an action to recover arrears of interest must be in writing and signed by the person by whom the interest was payable or his agent, and must be given to the person entitled thereto or his agent (*e*).

Upon a sale of land which was subject to mortgage the purchaser and the mortgagee enquired from the mortgagee the amount owing, and the mortgagee signed a memorandum, endorsed upon the mortgage, of the amount claimed by him. The conveyance to the purchaser was made subject to the mortgage, upon which there was stated to be owing the amount claimed, the payment of which amount the plaintiff assumed. The conveyance was not executed by the purchaser. It was held that there was no sufficient acknowledgment, and that as against an encumbrancer claiming under the purchaser the mortgagee was entitled only to six years arrears of interest (*f*).

(*e*) See §266, *supra*, where the text of the section is quoted.
(*f*) Colquhoun v. Murray, 1899, 26 O.A.R. 204.

An acknowledgment is available only against the person giving it. Thus an acknowledgment given by the mortgagor will not enable the mortgagee to whom it was given to recover more than six years' arrears of interest as against a second mortgagee whose mortgage was in existence at the time of the acknowledgment (*g*). An acknowledgment by one of two executors and devisees in trust of real estate, against the wishes of the other, that more than six years' arrears of interest are due on a mortgage created by their testator cannot be treated as the valid act of the two in their capacities as trustees, and is not a sufficient acknowledgment under the statute (*h*).

Under ss. 20 and 24, applicable to actions for redemption (*i*) and for the recovery of money out of land (*j*) respectively, the running of the statute will be interrupted if an acknowledgment is given "in the meantime," that is before the expiration of the period of limitation. No similar words occur in s. 18, and it would seem that under this section an acknowledgment given more than six years after the interest falls due would be sufficient in point of time, provided it is given before an action to recover the principal or for foreclosure, sale or possession is barred.

C. ACTIONS FOR POSSESSION, FORECLOSURE OR SALE.

§268. *Limitation prior to 1833.*

A mortgagor's right to redeem will not be barred by lapse of time so long as he remains in possession, but it may be barred if he is out of possession. Conversely, if a mortgagee has obtained possession, his right to foreclose will not be barred by lapse of time so long as he remains in possession, but if he

(*g*) *Bolding v. Lane*, 1863, 1 DeG. J. & S. 122.

(*h*) *Astbury v. Astbury*, [1838] 2 Ch. 111.

(*i*) See §281, *infra*.

(*j*) See §265, *supra*.

is out of possession his right to foreclose or to bring an action for possession may be barred by lapse of time.

In England, prior to 1833, there was no statute limiting the time within which a mortgagor out of possession might sue for redemption or within which a mortgagee out of possession might sue for foreclosure. There was, however, a statute limiting the time within which a mortgagee might bring an action for possession of the mortgaged land, for by 21 Jac. I. c. 16, s. 1, it was enacted that no entry should be made into any lands but within twenty years after the right or title to the same should accrue. This statute was held to apply only to claims which were recognized in a court of law, and to have no application to a purely equitable claim, for instance, that of a mortgagor to redeem after his estate in the lands had been forfeited by his default in payment of the mortgage money.

The Court of Chancery, however, applied the statute by analogy. "For where the remedy in Equity is correspondent to the remedy at Law, and the latter is subject to a limit in point of time by the *Statute of Limitations*, a Court of Equity acts by analogy to the statute, and imposes on the remedy it affords the same limitation. This is the meaning of the common phrase, that a Court of Equity acts by analogy to the *Statute of Limitations*, the meaning being, that where the suit in Equity corresponds with an action at Law which is included in the words of the statute, a Court of Equity adopts the enactment of the statute as its own rule of procedure. But, if any proceeding in equity be included within the words of the statute, there a Court of Equity, like a Court of Law, acts in obedience to the statute." (k).

Thus, by analogy to the statute of James the rule became established in Chancery "that after twenty years' possession of the mortgagee, he should not be disturbed, or otherwise it

(k) *Knox v. Gye*, 1872, L.R. 5 H.L. 656, Lord Westbury, at p. 674.

would make property very precarious, and a mortgagee would be no more than a bailiff to the mortgagor, and subject to an account; which would be a great hardship." (*l*) Conversely, the Court of Chancery would not entertain a suit for foreclosure after the lapse of the period of twenty years which would operate as a bar to a common law action for recovery of possession of the land.

Similarly, by analogy to the statute, if the mortgagor was prevented from asserting his claim by reason of any of the impediments mentioned in the statute, namely, imprisonment, infancy, coverture, unsoundness of mind or being beyond the seas (not having absconded), a period of ten years after the removal of the impediment was allowed to him. A very slight act on the part of the mortgagee, acknowledging the title of the mortgagor, was sufficient to take the case out of the statute. The case was also taken out of the statute by the mortgagor's remaining in possession of part of the mortgaged lands (*m*).

§269. *The Real Property Limitation Acts.*

The statute of James, so far as it was applied by analogy or otherwise to claims to real property, was superseded in England by the Real Property Limitation Act of 1833 (3 & 4 W. 4, c. 27) and in Upper Canada by a similar statute of 1834 (4 W. 4, c. 1). The general period of limitation stated in these statutes was twenty years, but in 1874 by 37 & 38 V. c. 57 (operative from the 1st of January, 1879) the period under the English statute was reduced to twelve years, and

(*l*) Lord Hardwicke in *Anon.*, 1746, 3 Atk. 313. See also *Bonney v. Ridgard*, 1784, 1 Cox's Cas. in Ch. 145, at p. 149; *Barron v. Martin*, 1815, 19 Ves. 327.

(*m*) 2 W. & T.L.C. Eq. 6th ed., pp. 1219-1220. As to the present law respecting the effect of the disability of the person entitled to redeem, see §278; as to effect of an acknowledgment of title by the mortgagee, see §281; as to effect of the mortgagor's possession of part of the mortgaged lands, see §280.

in the same year by 38 V. c. 16 (operative with some exceptions from the 1st of July, 1876) the period in Ontario was reduced to ten years.

The provisions of these statutes relating to actions or other proceedings to recover money charged upon or payable out of land or rent have been already discussed (*n*). Those relating to actions for possession, foreclosure or sale, and redemption will next be considered (*o*).

Owing to the changes made from time to time in the statutes of limitations, it has sometimes become necessary to decide the question whether the statute in force at the time of action brought or that in force at the time when the right accrues should govern. The correct rule would seem to be that if an action is brought to enforce an alleged right, or if in a pending action a claim is made by amendment, the cause of action is governed by the appropriate statute of limitations which is in force at the time of the bringing of the action or of the making of the amendment, as the case may be (*p*), but in some cases the court seems to have acted on the rule that the governing statute is the statute which was in force when the right accrued (*q*).

§270. *Action to recover land.*

The English Real Property Limitation Act of 1833 contained no provision specially applicable to a suit for foreclos-

(*n*) See §§264-267, *supra*.

(*o*) The provisions affecting the mortgagee's right to sue will be first discussed. As to the provisions affecting the mortgagor's right to sue for redemption, see §§277 ff.

(*p*) *Dumble v. Larush*, 1878-J, 25 Gr. 552, 27 Gr. 187; *Harris v. Prentiss*, 1880, 30 U.C.C.P. 484, S.C. varied on another point, *sub nom.* *Harris v. Mudie*, 1882, 7 O.A.R. 414; *In re Loveridge, Pearce v. Marsh*, [1904] 1 Ch. 518.

(*q*) *Faulds v. Harper*, 1884, 9 O.A.R. 537, 1886, 11 Can. S.C.R. 639; *Smith v. Darling*, 1916, 36 O.L.R. 587, at p. 590, S.C. 55 Can. S.C.R. 82, 36 D.L.R. 1.

ure to *nonrim* by a mortgagee out of possession, but it provided in general terms that no person should "make an entry" or "bring an action to recover any land" after the statutory period. This general provision, originally enacted by s. 2 of the statute of 1833, was superseded by s. 1 of the statute of 1874 (which reduced the limitation period from twenty to twelve years), and the corresponding provision in Ontario is now contained in the Limitations Act, R.S.O. 1914, c. 75, s. 5, as follows:

5. No person shall make an entry or distress, or bring an action to recover any land or rent, but within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to some person through whom he claims, or if such right did not accrue to any person through whom he claims, then within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing the same.

This section is amplified by s. 6 which defines in detail the point of time at which in various circumstances the right to make an entry or distress or to bring an action shall be deemed to have first accrued within the meaning of s. 5, and s. 7 which makes special provision as to the effect upon a future estate of the fact that the person entitled to the particular estate upon which the future estate is expectant is out of possession (*r*).

After some conflict of opinion, it was held that an action for foreclosure or sale is an action to recover land within the meaning of s. 5, not an action to recover money charged on land under s. 24 (*s*).

The statute does not apply to cases merely of want of ac-

(*r*) See §271, *infra*.

(*s*) *Wrixon v. Vize*, 1842, 3 Dr. & War. 104; *Harlock v. Ashberry*, 1882, 19 Ch.D. 539; *Pugh v. Heath*, 1882, 7 App. Cas. 235, 16 R.C. 389; *Fletcher v. Rodden*, 1882, 1 O.R. 155; *Trust and Loan Co. v. Stevenson*, 1892, 20 O.A.R. 66, at pp. 79-80. As to the case of *Pugh v. Heath*, see also §274.

tual possession, by the plaintiff, but to those cases only where he has been out of possession and another person has been in possession for the statutory period. There must be both want of possession by the person who has the right and actual possession by another, whether adverse or not, to be protected, to bring the case within the statute. Thus, where the owner of the fee simple of a close, with minerals under it, conveyed the surface, reserving the minerals with the right of entry to get them, and he afterwards granted the minerals with such right of entry, it was held that mere non-user for the statutory period was not sufficient to bar the grantee's right of entry to get the minerals, no other person having worked or been in possession of the minerals *(t)*.

The owner of land is deemed to be in possession of waste lands which are not in the actual possession of another. Thus, where a trespasser took possession of the land of another, and without having held long enough to acquire title, abandoned possession, it was held that the owner was restored, without any actual entry, to the possession which he had before the trespass *(u)*.

Where the mortgaged lands are not re-demised to the mortgagor, and the land is vacant at the time of the execution of the mortgage, the mortgagee is deemed to be in possession by operation of law, and the presumption of payment of the mortgage moneys after the lapse of the statutory period does not arise, even though the mortgagee has never made an actual entry or received any payment on account of the mortgage. The mere fact that the remedy on the covenant is barred by the statute will not establish a payment so as to reconvey the legal title to the mortgagor *(v)*. So where a

(t) *Smith v. Lloyd*, 1854, 9 Exch. 562, 16 R.C. 328.

(u) *Trustees, Executors, and Agency Co. v. Short*, 1888, 13 App. Cas. 793; *Samuel Johnson & Sons v. Brock*, [1907] 2 Ch. 533.

(v) *Mahar v. Fraser*, 1867, 17 U.C.C.P. 408.

right of entry has accrued to a mortgagee without actual entry by him, and the mortgaged lands are subsequently left vacant before a title by possession has been acquired by anyone, the constructive possession thereof is in the mortgagee, and the statute does not run against him so as to extinguish his title to the lands, the mortgage being in default and no presumption of payment arising *in*.

Where a purchaser in examining a title found a mortgage which matured over 80 years previously, apparently outstanding, and required the vendors to produce the discharge of it which they declined to do, it was held that under all the circumstances the mortgage must be presumed to have been paid.

"Action" is defined by the interpretation clause of the Limitations Act, R.S.O. 1914, c. 75, s. 2, to include information on behalf of the crown and any civil proceeding, but it is provided by s. 4 as follows:

1. (1) No entry, distress, or action shall be made or brought on behalf of His Majesty against any person for the recovery of or respecting any land or rent, or of land or for or concerning any revenues, rents, issues or profits, but within sixty years next after the right to make such entry or distress or to bring such action shall have first accrued to His Majesty.

(2) Subsections 1 to 3, 5 to 7, and 9 to 12 of section 6 and sections 7, 9 to 12 and 14 to 16 shall apply to rights of entry, distress or action asserted by or on behalf of His Majesty (*u*).

(c) *Delaney v. Canadian Pacific Ry. Co.*, 1891, 21 O.R. 11; cf. *Bucknam v. Stewart*, 1897, 11 M.R. 625 (land in a state of nature); *British Canadian Loan and Agency Co. v. Farmer*, 1904, 15 M.R. 393; *Creamer v. Gooderham*, 1914, 7 S.L.R. 173, 17 D.L.R. 235. It does not necessarily follow, however, that the mortgagee's possession is such actual possession as will operate to bar the right to redeem. See §276.

(d) *Imperial Bank of Canada v. Metcalfe*, 1886, 11 O.R. 467.

(e) As to ss. 6, 7, and 9 to 12, see §271, *infra*; as to ss. 14 and 15, see §272; and as to s. 16, see §276.

§271. When the right is deemed to accrue.

The English Real Property Limitation Act of 1833 contained various provisions as to the point of time at which the right to make an entry or bring an action should be deemed to have first accrued within the meaning of s. 2 (2), and as to the effect upon a future estate of the fact that the person entitled to the particular estate upon which the future estate was expectant was out of possession. These provisions were amended by the statute of 1874. The corresponding provisions in Ontario are contained in R.S.O. 1914, c. 75, ss. 6 to 13, as follows:

6. - (1) Where the person claiming such land or rent, or some person through whom he claims, has, in respect of the estate or interest claimed, been in possession or in receipt of the profits of such land, or in receipt of such rent, and has, while entitled thereto, been dispossessed, or has discontinued such possession or receipt, the right to make an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were so received.

(2) Where the person claiming such land or rent claims the estate or interest of a deceased person who continued in such possession or receipt, in respect of the same estate or interest, until the time of his death, and was the last person entitled to such estate or interest who was in such possession or receipt, such right shall be deemed to have first accrued at the time of such death.

(3) Where the person claiming such land or rent claims in respect of an estate or interest in possession, granted, appointed or otherwise assured by an assurance, to him or some person through whom he claims, by a person being, in respect of the same estate or interest, in the possession or receipt of the profits of the land, or in receipt of the rent, and no person entitled under such assurance has been in possession or receipt, such right shall be deemed to have first accrued at the time at which the person so claiming or the person through whom he claims, became entitled to such possession or receipt by virtue of such assurance.

(4) In the case of land granted by the Crown of which the grantee, his heirs or assigns, by themselves, their servants or agents, have not taken actual possession by residing upon or cultivating some part thereof, and of which some other person not claiming to

(2) R.S.O. 1914, c. 75, s. 5. See §270, *supra*.

hold under such grantee has been in possession, such possession having been taken while the land was in a state of nature, then unless it is shown that such grantee or person claiming under him while entitled to the land had knowledge of the same being in the actual possession of such other person, the lapse of ten years shall not bar the right of such grantee or any person claiming under him to bring an action for the recovery of such land, but the right to bring an action shall be deemed to have accrued from the time that such knowledge was obtained; but no such action shall be brought or entry made after twenty years from the time such possession was taken.

(5) Where any person is in possession or in receipt of the profits of any land, or in receipt of any rent by virtue of a lease in writing, by which a rent amounting to the yearly sum of \$4 or upwards is reserved, and the rent reserved by such lease has been received by some person wrongfully claiming to be entitled to such land or rent in reversion immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease has afterwards been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent, subject to such lease, or of the person through whom he claims to make an entry or distress, or to bring an action after the determination of such lease, shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person so wrongfully claiming, and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled.

(6) Where any person is in possession or in receipt of the profits of any land, or in receipt of any rent as tenant from year to year or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or to bring an action to recover such land or rent, shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy was received, whichever last happened.

(7) Where any person is in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or to bring an action to recover such land or rent, shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined.

(8) No mortgagor or *cestui que trust* shall be deemed to be a tenant at will to his mortgagee or trustee within the meaning of the next preceding subsection (a).

(9) Where the person claiming such land or rent, or the person through whom he claims, has become entitled by reason of any forfeiture or breach of condition such right shall be deemed to have first accrued when such forfeiture was incurred or such condition broken.

(10) Where any right to make an entry or distress, or to bring an action to recover any land or rent, by reason of any forfeiture or breach of condition, has first accrued in respect of any estate or interest in reversion or remainder and the land or rent has not been recovered by virtue of such right, the right to make an entry or distress, or to bring an action to recover such land or rent, shall be deemed to have first accrued in respect of such estate or interest at the time when the same became an estate or interest in possession as if no such forfeiture or breach of condition had happened.

(11) Where the estate or interest claimed is an estate or interest in reversion or remainder, or other future estate or interest, and no person has obtained the possession or receipt of the profits of such land, or the receipt of such rent, in respect of such estate or interest, such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession.

(12) A right to make an entry or distress, or to bring an action to recover any land or rent, shall be deemed to have first accrued, in respect of an estate or interest in reversion or remainder or other future estate or interest at the time at which the same became an estate or interest in possession, by the termination of any estate or estates in respect of which such land has been held or the profits thereof or such rent have been received, notwithstanding that the person claiming such land or rent, or some person through whom he claims, has, at any time previously to the creation of the estate or estates which have determined, been in the possession or receipt of the profits of such land, or in receipt of such rent.

7.—(1) If the person last entitled to any particular estate on which any future estate or interest was expectant has not been in the possession or receipt of the profits of such land, or in receipt of such rent, at the time when his interest determined, no such entry or distress shall be made and no such action shall be brought by any person becoming entitled in possession to a future estate or interest, but within ten years next after the time when the right to make an entry or distress, or to bring an action for the recovery of

(a) As to a mortgagor in possession, see chapter 22, *Action for Possession*, §213.

such land or rent, first accrued to the person whose interest has so determined, or within five years next after the time when the estate of the person becoming entitled in possession has become vested in possession, whichever of those two periods is the longer.

(2) If the right of any such person to make such entry or distress, or to bring any such action, has been barred no person afterwards claiming to be entitled to the same land or rent in respect of any subsequent estate or interest under any deed, will or settlement executed or taking effect after the time when a right to make an entry or distress or to bring an action for the recovery of such land or rent, first accrued to the owner of the particular estate whose interest has so determined, shall make any such entry or distress, or bring any such action, to recover such land or rent.

(3) Where the right of any person to make an entry or distress or to bring an action to recover any land or rent to which he has been entitled for an estate or interest in possession, has been barred by the determination of the period which is applicable in such case, and such person has, at any time during such period, been entitled to any other estate, interest, right, or possibility, in reversion, remainder or otherwise, in or to the same land or rent, no entry, distress or action shall be made or brought by such person, or by any person claiming through him, to recover such land or rent in respect of such other estate, interest, right or possibility, unless in the meantime such land or rent has been recovered by some person entitled to an estate, interest or right which has been limited or taken effect after or in defeasance of such estate or interest in possession.

8. For the purposes of this Act, an administrator claiming the estate or interest of the deceased person of whose property he has been appointed administrator, shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of the letters of administration.

9. No person shall be deemed to have been in possession of any land, within the meaning of this Act, merely by reason of having made an entry thereon.

10. No continual or other claim upon or near any land shall give any right of making an entry or distress, or of bringing an action.

11. No descent, cast, discontinuance or warranty, which has happened or been made since the 1st day of July, 1834, or which may hereafter happen or be made, shall toll or defeat any right of entry or action for the recovery of land.

12. Where any one or more of several persons entitled to any land or rent as coparceners, joint tenants or tenants in common has or have been in possession or receipt of the entirety, or more than his

or their undivided share or shares of such land, or of the profits thereof, or of such rent for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last mentioned person or persons, or any of them.

13. Where a relation of the persons entitled, as heirs, to the possession or receipt of the profits of any land, or to the receipt of any rent, enters into the possession or receipt thereof, such possession or receipt shall not be deemed to be the possession or receipt of or by the persons entitled as heirs.

The possession of the mortgagor is not adverse to the rights of the mortgagee, and the statute does not begin to run against the mortgagee, until his right to bring the action arises (*b*). When the mortgage provides for possession by the mortgagor until default the right of action arises when the mortgagor has made default. If, however, the mortgage deed does not contain a provision that the mortgagor shall be entitled to remain in possession, the time will begin to run from the date of the mortgage (*c*). In the case of a mortgage payable on demand, the right of action arises immediately upon the execution of the mortgage, and a demand is not necessary (*d*).

Under a mortgage containing the statutory provision that in default of the payment of the interest the principal shall become payable, default in payment of interest has the effect of making the principal payable as if the time for payment had fully come, and a right of action therefore then arises and the Statute of Limitation then begins to run (*c*).

It has been held that the registration of a discharge of mortgage has the effect of revesting the title in the mortgagor

(*b*) *Doe d. Jones v. Williams*, 1836, 5 A. & E. 291; *Wrixon v. Vize*, 1842, 3 Dr. & War. 104.

(*c*) *Doe d. Roylance v. Lightfoot*, 1841, 8 M. & W. 553.

(*d*) *In re Brown's Estate*, *Brown v. Brown*, [1893] 2 Ch. 300.

(*e*) *McFadden v. Brandon*, 1904, 8 O.L.R. 610.

and gives a new starting point in favour of the mortgagor as against a person claiming possession adversely (*f*).

In the case of a future estate or interest the right to bring an action continues for ten years after the estate has become an estate in possession, even although the action on the covenant has been in the meantime barred by lapse of time (*g*).

The statute runs against a second mortgagee notwithstanding that the prior mortgagee is in possession during the whole or part of the statutory period, the second mortgagee's interest not being a future interest within the meaning of sub-s. 11 of s. 6 (*h*). Similarly the statute runs against a mortgagee of the fee simple notwithstanding the existence of a prior lease for 21 years. The interest mortgaged in such case is properly described, not as being a remainder of freehold expectant upon the term of years, but as being the freehold in possession subject to the term. Inasmuch as the object of a foreclosure action is not to obtain the payment of rent but to deprive the mortgagor of his right to redeem, the fact that the mortgagee will not by bringing his action derive any immediate pecuniary benefit from the rents and profits—because, for instance, the rent is a peppercorn or has been paid in advance—will not prevent time from running under the statute (*i*).

One Scotheran, having obtained a registered conveyance of the land in suit from one of the respondents, executed, more than ten years before action, a reconveyance to both respondents, indorsing thereon a forged certificate of registration, and later on mortgaged it to the appellants within

(*f*) *Henderson v. Henderson*, 1896, 23 O.A.R. 577; see, however, *Noble v. Noble*, 1912, 27 O.L.R. 342, 9 D.L.R. 725.

(*g*) *Hugill v. Wilkinson*, 1888, 38 Ch.D. 480.

(*h*) *Samuel Johnson & Sons v. Brock*, [1907] 2 Ch. 533.

(*i*) *Wakefield and Barnsley Union Bank v. Yates*, [1916] 1 Ch. 452.

the said ten years. It was held that the respondents were not protected by the Limitations Act. The reconveyance was valid between the parties thereto, and no action could have been brought against them before the date of the appellants' mortgage, which was within the statutory period (j).

The English statute of 1833, 3 & 4 W. 4, c. 27, s. 26, provided for the case of concealed fraud. The corresponding provision in Ontario is contained in R.S.O. 1914, c. 75, ss. 32 and 33, as follows:

32. In every case of a concealed fraud the right of any person to bring an action for the recovery of any land or rent of which he or any person through whom he claims may have been deprived by such fraud shall be deemed to have first accrued at and not before the time at which such fraud was or with reasonable diligence might have been first known or discovered.

33. Nothing in the next preceding section shall enable any owner of land or rent to bring an action for the recovery of such land or rent, or for setting aside any conveyance thereof, on account of fraud against any purchaser in good faith for valuable consideration, who has not assisted in the commission of such fraud, and who, at the time that he made the purchase did not know, and had no reason to believe that any such fraud had been committed.

It has been held that s. 32 must be strictly construed. "Concealed fraud" is not to be inferred from the simple fact that a person has got possession under a false assertion of title (k). Fraud, to take a case out of the statute, must be the fraud of the person who seeks the protection of the statute or his agent (l).

§272. *Acknowledgment.*

It is provided in Ontario by R.S.O. 1914, c. 75, ss. 14 and 15, as follows:

(j) *McVity v. Tranouth*, [1908] A.C. 60, reversing 36 Can. S.C.R. 455.

(k) *In re Jennens*, 1880, 50 L.J. Ch. 4, 16 R.C. 359; *Willis v. Earl Howe*, [1893] 2 Ch. 545; see also *Taylor v. Davies*, 1917, 41 O.L.R. 403, at pp. 422, 423, and cases there cited.

(l) *Thorne v. Heard*, [1895] A.C. 495.

14. Where any acknowledgment in writing of the title of the person entitled to any land or rent has been given to him or to his agent, signed by the person in possession or in receipt of the profits of such land, or in the receipt of such rent, such possession or receipt of or by the person by whom such acknowledgment was given shall be deemed, according to the meaning of this Act, to have been the possession or receipt of *c.* by the person to whom or to whose agent such acknowledgment was given at the time of giving the same, and the right of such last mentioned person, or of any person claiming through him, to make an entry or distress or bring an action to recover such land or rent, shall be deemed to have first accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given.

15. The receipt of the rent payable by any lessee, shall, as against such lessee or any person claiming under him, but subject to the lease, be deemed to be the receipt of the profits of the land for the purpose of this Act.

These sections are derived from the English statute of 1833, 3 & 4 W. 4, c. 27, ss. 14 and 35.

An acknowledgment under s. 14 differs from that required by s. 24. Under the former section the acknowledgment must be signed by the person in possession; under s. 24 it may be signed by the person by whom the money sought to be recovered is payable or his agent (*m*).

Under s. 14 an acknowledgment signed by an agent of the person in possession was held to be insufficient (*n*), but an acknowledgment signed by an agent at the dictation of the principal, who was too ill to write, has been held to be good (*o*).

The acknowledgment under either section is good if given to the person entitled or his agent. An acknowledgment given to a third person is ineffectual (*p*). Where a defendant by his answer in a suit in Chancery acknowledged the plaintiff's

(*m*) See §265, *supra*.

(*n*) *Ley v. Peter*, 1858, 3 H. & N. 101.

(*o*) *Corporation of Dublin v. Judge*, 1847, 11 Ir. L.R. 8.

(*p*) *Fursdon v. Clogg*, 1842, 10 M. & W. 572.

title this was held in a subsequent suit to be a good acknowledgment (*q*). An acknowledgment to a trustee of the person entitled is sufficient to give the statute a new starting point (*r*). An acknowledgment made by the person in possession to the mortgagor will have the effect of saving the mortgagee's rights (*s*).

It may be laid down as a general rule that any form of words that may reasonably be construed into an admission of the right of the person entitled will be sufficient. A letter written by the person in possession, asking for time for payment, to the mortgagee's solicitor in reply to a letter demanding payment, is a good acknowledgment (*t*).

The words in the section "at the time of giving same" mean at the time the acknowledgment was signed and not necessarily at the date it bears on its face (*u*).

An oral acknowledgment is insufficient to prevent the statute from running (*v*), but where a written acknowledgment has been lost, it may be proved by parol (*w*).

An acknowledgment given after the expiration of the statutory period is too late (*x*), as the title of the person claiming is extinguished after the lapse of the statutory period (*y*).

(*q*) *Goode v. Job*, 1858, 28 L.J.Q.B. 1.

(*r*) *McIntyre v. The Canada Co.*, 1871, 18 Gr. 367.

(*s*) *Hooker v. Morrison*, 1881, 28 Gr. 369.

(*t*) *Fursdon v. Clogg*, 1842, 10 M. & W. 572.

(*u*) *Doe d. Curzon v. Edmunds*, 1840, 6 M. & W. 295.

(*v*) *Doe d. Perry v. Henderson*, 1847, 3 U.C.R. 486, at p. 499.

(*w*) *Haydon v. Williams*, 1830, 7 Bing. 163.

(*x*) *McDonald v. McIntosh*, 1851, 8 U.C.R. 388; *Doe d. Perry v. Henderson*, 1846, 3 U.C.R. 486; *Sanders v. Sanders*, 1881, 19 Ch.D. 373. As to an acknowledgment under s. 20, see §281, *infra*.

(*y*) R.S.O. 1914, c. 75, s. 16. See §276, *infra*.

§273. *Part payment.*

The English statute of 1833, 3 & 4 W. 4 c. 27, also contained a section limiting the time within which an action might be brought to recover any sum of money secured by any mortgage or lien or otherwise charged upon or payable out of land or rent, and by this section provision was made as to the effect not only of an acknowledgment in writing, but also of a payment of part of the principal or interest (z).

As the provision just mentioned was confined to an action to recover money, an additional and explanatory statute—7 W. 4 & 1 V. c. 28—was passed in England in 1837 “for the purpose of preserving in the mortgagee the right to make an entry and bring an ejectment to recover the lands” (a). This explanatory statute was superseded by s. 9 of the statute of 1874 (which reduced the limitation period from twenty to twelve years). The English statute was adopted in Upper Canada in 1853 by 16 V. c. 121, and the period was reduced to ten years by the statute 38 V. c. 16, s. 12. The provision now appears in R.S.O. 1914, c. 75, s. 23, as follows:

23. Any person entitled to or claiming under a mortgage of land may make an entry or bring an action to recover such land, at any time within ten years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than ten years have elapsed since the time at which the right to make such entry or bring such action first accrued.

A payment under s. 23 must be a payment by a person liable to pay as mortgagor or his agent, or at least by a person bound or entitled to make a payment of principal or interest for the mortgagor (b). A payment of rent made by a tenant of the mortgaged property to the mortgagee pursuant to a

(z) This provision was amended in 1874 and the corresponding provision in Ontario is R.S.O. 1914, c. 75, s. 24. See §§264 and 265, *supra*.

(a) *Chinnery v. Evans*, 1864, 11 H.L.C. 115, at p. 133.

(b) *Chinnery v. Evans*, 1864, 11 H.L.C. 115.

notice by the mortgagee requiring the rent to be paid to him is not such a payment (c), but a payment made by any person "concerned to answer the debt," or by a person who under the mortgage contract is entitled to make a tender, and from whom the mortgagee is bound to accept a tender, of money for the redemption of the mortgage, is a sufficient payment (d). So, a payment is sufficient if made by a person who has become bound to the debtor to pay, for instance, a transferee of the equity of redemption who is bound as between himself and the transferor to pay, notwithstanding that such transferee has himself transferred the equity to a third person (e).

The provision of s. 56 of the Limitations Act (f) by which no joint debtor or covenantor is to lose the benefit of the statute by reason only of an acknowledgment or payment by another joint debtor or covenantor applies only to an acknowledgment or payment under ss. 54 and 55, not to an acknowledgment or payment under s. 24 or under ss. 14 and 23 (g).

The provisions of s. 23 apply not only as against the mortgagor and persons claiming under him but also as against a person who has acquired a good title by virtue of the statute of limitations as against the mortgagor and those claiming under him (h). The section does not, however, confer a new right of entry on a mortgagee when at the date of the mort-

(c) *Harlock v. Ashberry*, 1882, 19 Ch.D. 539. See §265, *supra*, where this case is more fully referred to.

(d) *Lewin v. Wilson*, 1886, 11 App. Cas. 639, at pp. 644, 646. In this case it was held that a payment by the principal debtor was sufficient to create a new starting point as against the land of a surety.

(e) *Trust & Loan Co. v. Stevenson*, 1892, 20 O.A.R. 66; see also *Ross v. Schmitz*, 1913, 6 S.L.R. 131, 14 D.L.R. 648.

(f) See §265, *supra*.

(g) *Lewin v. Wilson*, *supra*; *In re Frisby*, *Allison v. Frisby*, 1889, 43 Ch.D. 106.

(h) *Ludbrook v. Ludbrook*, [1901] 2 K.B. 96.

gage a person is in possession in whose favour the statute has already begun to run against the mortgagor (*i*).

The payment of taxes by the mortgagor constitutes a sufficient acknowledgment of the mortgagee's title so as to interrupt the running of the statute, if the payment is made in pursuance of an express agreement with the mortgagee that the mortgagor will pay the taxes as rent, and no other rent is stipulated for (*j*), but the payment of the taxes only is not sufficient if it has been agreed that the taxes should be paid in addition to a named rent (*k*).

§274. *Effect of bringing action.*

The bringing of an action for possession will prevent the further lapse of time from being a bar to the plaintiff's claim

l unless the action is afterwards discontinued or the writ of summons is not served or renewed within the period allowed for these purposes (*m*).

Where an action has become defective by the death of a party or otherwise, the discretion of the court will not be exercised to allow the proceedings to continue if there has been great delay or gross negligence (*n*).

It has been held that a proceeding under the Quia

(*i*) *Thornton v. France*, [1897] 2 Q.B. 113. In so far as *Cameron v. Walker*, 1890, 19 O.R. 212, is a decision to the contrary, it is overruled by *Thornton v. France*; see *McVity v. Trenouth*, 1905, 9 O.L.R. 195, at p. 109, S.C. 36 Can. S.C.R. 455, [1908] A.C. 63.

(*j*) *East v. Clarke*, 1915, 33 O.L.R. 624, 23 D.L.R. 74.

(*k*) *Finch v. Gilray*, 1889, 16 O.A.R. 484; *Brennan v. Finley*, 1905, 9 O.L.R. 131.

(*l*) *Turley v. Williamson*, 1880, 5 U.C.C.P. 538.

(*m*) *Pratt v. Hawkins*, 1846, 15 M. & W. 399; *Doyle v. Kauffman*, 1877, 3 Q.B.D. 7, 340; *Hewitt v. Barr*, [1891] 1 Q.B. 98; *Travato v. Dominion Cannery*, 1916, 35 O.L.R. 295, 26 D.L.R. 507.

(*n*) *Curtis v. Sheffield*, 1882, 20 Ch.D. 398.

'Titles Act (o) is not an action or proceeding that will prevent the statute from running (p).

Where in Nova Scotia an action of ejectment was brought by the mortgagee to recover possession of the mortgaged lands, in which judgment was obtained and a writ of possession issued but not executed, it was held that these proceedings interrupted the running of the statute as against the mortgagee seeking foreclosure (q).

A question which on principle is debateable is whether an action for foreclosure in which possession is not claimed (r) is sufficient to interrupt the running of the statute. Strictly speaking, if the question were open, it would seem that a mortgagee who takes the legal title by his mortgage, must, like any other owner of land who is out of possession, bring an action for recovery of the land within the statutory period and cannot properly be said to have brought such an action when he seeks no remedy *in rem* but merely seeks to deprive the mortgagor of his equitable right to redeem (s). On the other hand in the case of an equitable mortgage forming a first charge on the legal estate it would be easier than in the case of a legal mortgagee to justify the view that a foreclosure action is an action to recover land, because in the case of a foreclosure action upon such equitable mortgage the plaintiff seeks not merely to deprive the mortgagor of his equitable right but also to acquire the legal title. It is obvious, however, that a legal mortgagee ought not to be in a worse position than

(o) Now R.S.O. 1914, c. 123.

(p) *Laing v. Avery*, 1867, 14 Gr. 33.

(q) *McKeen v. McKay*, 1875, Russ. (N.S. Eq.) 121.

(r) A claim for possession may now be joined with a claim for foreclosure in one action, and such a combination of claims is in accordance with the usual practice. See chapter 22, *Action for Possession*, §211.

(s) See chapter 3, *Legal Mortgage in Equity*, §22, as to the nature of foreclosure.

an equitable mortgage as regards the statute of limitations and that the mortgagor must take possession of the whole before the mortgagee can bring an action for possession. It is held that he has not brought an action for possession within the statutory period.

The question is concluded by the case of *Pugh v. Heath* (1) to the extent that it was there held that the effect of an order of foreclosure absolute obtained by a legal mortgagee is to vest the ownership and beneficial interest in the mortgaged land for the first time in the mortgagee, so that an action brought by the mortgagee within two years next to the date of the order of foreclosure to recover possession of the land was not barred by the statute of limitations, although more than twenty years had elapsed since the mortgage was made. The land had been conveyed to the mortgagor and since the last payment of principal and interest had been secured by the mortgage.

When a mortgagee takes possession after the making of a mortgage and remains in possession for more than the statutory period without payment of rent or acknowledgment of the debt, it is held that he has not acquired a title by lapse of time as against the mortgagor under the sheriff's deed made under the execution of a writ in foreclosure proceedings, if the foreclosure has not been completed less than the statutory

(1) 1881, 7 App. Cas. 335, 16 L.C. 389 (Earl Cairns, Lord Blackburn, Lord Macnaghten, Lord Watson), affirming *Heath v. Pugh*, 1881, 6 Q.B.D. 315, 5 R.C. 376 (Lord Selborne, L.C., Baggallay and Bowen, J.), reversing Lord Coleridge C.J. and Lindley J.).

(2) 1 & 2 Vict. c. 27 and 1 Vict. c. 28, under which the period was twelve years, which has now become twelve years in England and ten in Scotland.

(3) The mortgagee's possession is not, however, equivalent to the mortgagor's possession, and if the mortgagee has not taken possession, a foreclosure action he must bring an action for possession. *Wood v. Wheeler*, 1882, 22 Ch.D. 281.

period before the bringing of the action by the grantee against the person in possession (10).

A mortgagee of land, instead of proceeding to foreclosure and sale, brought an action of ejectment against the mortgagor, and recovered judgment on default of appearance and plea. The judgment was recorded but no further steps were taken upon it for a period of upwards of twenty years, either by revivor or issue of execution, or by taking possession of the land. It was held that the judgment could not be enforced after the expiration of twenty years from its date, and that the lapse of time was a bar to both the mortgage and the judgment (11).

275. *Disabilities in case of action to recover land.*

In the English statute of 1883, 3 & 4 W. 4, c. 27, the general twenty-year period of limitation for entry or action was subject to an extension, in favour of a person who was under disability or someone claiming under him, for a further period of twelve years after such person ceased to be under disability or died, whichever of those two events first happened (s. 16), provided that the entry must be made or the action brought within forty years of the time when the right first accrued (s. 17), and that additional time should not be allowed for the disabilities of successive claimants (s. 18). These provisions were superseded by ss. 3, 5 and 9 of the statute of 1874 (which reduced the additional period allowed for disability from ten to six years and reduced the ultimate limitation of forty years to thirty years), and the corresponding provisions in Ontario are R.S.O. 1914, c. 75, ss. 40, 41 and 42, as follows:

40. If at any time at which the right of any person to take an entry or distress, or to bring an action to recover land

(10) *Archibald v. Lawlor*, 19

(11) *Re James Ling*, 1908, 4

rent, first accrues, as herein mentioned, such person is under any of the disabilities hereinafter mentioned, that is to say, infancy, idiocy, lunacy or unsoundness of mind, such person, or the person claiming through him, notwithstanding that the period of ten years or five years, as the case may be, hereinbefore limited has expired, may make an entry or distress, or bring an action, to recover such land or rent at any time within five years next after the time at which the person to whom such right first accrued ceased to be under any such disability, or died, whichever of those two events first happened.

The corresponding section of the English Act of 1874 (s. 3) specifies "coverture" as one of the disabilities provided for. The Ontario statute was changed in this respect by 38 V. c. 16 (a).

A disability arising after the right has accrued will not prevent the time from running.

41. No entry, distress, or action, shall be made or brought by any person who, at the time at which his right to make any entry or distress, or to bring an action, to recover any land or rent first accrued was under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but within twenty years next after the time at which such right first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such twenty years, or although the term of five years from the time at which he ceased to be under any such disability, or died, may not have expired.

If a person is under one disability when his right first accrues and then falls under another disability before the removal of the first, his right may be enforced after the removal of the second, provided it be within the ultimate limitation (a).

42. Where any person is under any of the disabilities hereinbefore mentioned, at the time at which his right to make an entry or distress, or to bring an action to recover any land or rent first accrues, and departs this life without having ceased to be under any such disability, no time to make an entry or distress, or to bring

(a) Hicks v. Williams, 1888, 15 O.R. 228.

(c) Murray v. Watkins, 1890, 62 L.T. 796.

(a) Burrows v. Ellison, 1871, L.R. 6 Ex. 128.

an action to recover such land or rent beyond the period of ten years next after the right of such person to make an entry or distress, or to bring an action to recover such land or rent, first accrued or the period of five years next after the time at which such person died, shall be allowed by reason of any disability of any other person.

The foregoing sections apply to an action for foreclosure because such an action is an action to recover land within s. 5 of the statute (*b*).

§276. *Extinguishment of right and title.*

Provision was made by the English statute of 1833, 3 & 4 W. 4, c. 27, s. 34, for the extinguishment of the right and title of the person who failed to make an entry or bring an action within the statutory period. The corresponding provision in Ontario is now contained in R.S.O. 1914, c. 75, s. 16, as follows:

16. At the determination of the period limited by this Act to any person for making an entry or distress, or bringing any action, the right and title of such person to the land or rent, for the recovery whereof such entry, distress, or action respectively might have been made or brought within such period shall be extinguished.

If no action is brought within the period limited by the act the right itself as well as the remedy is extinguished. The effect of the section is to vest the lands in the mortgagor in the same manner as if a reconveyance had been executed (*c*). The statute differs in this respect from the statute of James whereby the remedy only is barred (*d*).

A mortgagee who has suffered the statute to run before he asserts his right of entry cannot, by afterwards getting possession of the property, revive his title to it, but he is in as

(*b*) See §270, *supra*. As to an action for redemption, see §278.

(*c*) *Doe d. Jukes v. Sumner*, 1845, 14 M. & W. 39; *Doe d. Carter v. Barnard*, 1849, 13 Q.B. 952; *Kibble v. Fairthorne*, [1895] 1 Ch. 219.

(*d*) *Gray v. Richford*, 1878, 2 Can. S.C.R. 431 at p. 454.

a mere trespasser. The insolvency of the mortgagor and the appointment of an assignee in insolvency does not suspend the running of the statute so as to preserve the lien and security of the mortgagee on the land mortgaged (e). An acknowledgment given after the statutory period has lapsed is insufficient to revive the title (f).

The effect of the section was explained by Cozens-Hardy M.R. in the following terms (g):

" . . . my present view is that the phrase 'statutory conveyance,' and so on, is a loose metaphorical term, and that the true view is this, that whenever you find a person in possession of property that possession is *prima facie* evidence of ownership in fee, and that *prima facie* evidence becomes absolute when once you have extinguished the right of every other person to challenge it. That is the effect of s. 34 of the Real Property Limitation Act, and that explains how the person who has been in possession for more than the statutory period does get an absolute legal estate in the fee, and there is nobody who can challenge the presumption which his possession of the property gives."

When the money due upon a mortgage has been paid to the mortgagee but no reconveyance has been executed, the mortgagor becomes from the date of such payment a tenant at will to the mortgagee and the legal estate of the mortgagee is extinguished by the adverse possession of the mortgagor for one year in addition to the statutory period (h).

A mortgagor's interest in the proceeds of sale of land held on trust for sale is an interest in "land" as defined by the Real Property Limitation Acts, and therefore after the lapse

(e) *Court v. Walsh*, 1882, 1 O.R. 167, affirmed 9 O.A.R. 294; *Doe d Dunlop v. McNab*, 1859, 5 U.C.R. 289.

(f) See §272, *supra*.

(g) In *Stkinson and Horsell's Contract*, [1912] 2 Ch. 1, at p. 9.

(h) *Sutton v. Thompson*, 1883, 22 Ch.D. 614. See R.S.O. 1914, c. 75, s. 6, sub-s. 7, in §271, *supra*.

of the statutory period, in the absence of any payment or acknowledgment, the mortgagee's title is extinguished (i).

D. ACTIONS FOR REDEMPTION.

§277. *Limitation if mortgagee in possession.*

The English Real Property Limitation Act of 1833, 3 & 4 c. 27, contained a provision (s. 28) limiting the time within which an action for redemption might be brought against a mortgagee in possession of the mortgaged land. This provision was superseded by s. 7 of the statute of 1874, 37 & 38 V. c. 57, by which the limitation period was reduced from twenty to twelve years (j). The corresponding provision in Ontario is contained in R.S.O. 1914, c. 75, s. 20, as follows:

20. Where a mortgagee has obtained the possession or receipt of the profits of any land or the receipt of any rent comprised in his mortgage the mortgagor, or any person claiming through him, shall not bring any action to redeem the mortgage, but within ten years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment in writing of the title of the mortgagor, or of his right to redemption, has been given to the mortgagor or to some person claiming his estate, or to the agent of such mortgagor or person, signed by the mortgagee, or the person claiming through him, and in such case no such action shall be brought, but within ten years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given.

The opinion has been expressed that the general rule that time begins to run from the taking of possession is subject to an exception if the mortgagee takes possession before the mortgage is due. Fisher on Mortgages (k), citing *Brown v. Cole* (l), says, "Time will not run in the case of a common

(i) *In re Fox, Brooks v. Marston*, [1913] 2 Ch. 75, following *In re Hazeldine's Trusts*, [1908] 1 Ch. 34, and *Kirkland v. Peatfield*, [1903] 1 K.B. 756.

(j) As to the Real Property Limitation Acts of 1833 and 1874, see §269, *supra*. As to the law prior to 1833, see §268, *supra*.

(k) 6th ed., s. 1404.

(l) 1845, 14 Sim. 427, 18 R.C. 116.

mortgage until the day of redemption has arrived; for the mortgagor cannot redeem before that day" (*m*). The proposition just quoted must, however, be accepted with caution. The decision in *Brown v. Cole* was to the effect that a mortgagor is not entitled to redeem before the expiration of the time limited for payment of the mortgage debt (*n*). The deduction that the statute will commence to run only from the same date appears to be based upon the assumption that the statutory bar can commence to run only from the time when the right arose, whereas the statute provides for the commencement from the time when the mortgagee obtained possession (*o*).

If actual possession is once obtained by a mortgagee in assertion of his legal right of entry, it need not be maintained continuously for the statutory period (*p*), but possession obtained by the mortgagee after the lapse of the statutory period does not cause his title to revive (*q*).

In the case of a Welsh mortgage time does not begin to run against the mortgagor until the mortgage is satisfied (*r*).

It has been held that the time will run against a person entitled to the equity of redemption in remainder, although the mortgagee enters into possession and the statutory period elapses in the lifetime of the tenant for life (*s*).

A prior mortgagee in possession acquires a title against

(*m*) See also *Wilson v. Walton*, and *Kirkdale Permanent Building Society*, 1903, 19 Times L.R. 408.

(*n*) See chapter 25, *Action for Redemption*, §252.

(*o*) In re *Metropolis and Counties Permanent Investment Building Society*, *Gatfield's Case*, [1911] 1 Ch. 698, at pp. 706-7.

(*p*) *Kay v. Wilson*, 1877, 2 O.A.R. 133.

(*q*) *Court v. Walsh*, 1882, 1 O.R. 167, 9 O.A.R. 294.

(*r*) See chapter 1, *Introductory*, §2.

(*s*) *Harrison v. Hollins*, 1812, 1 S. & St. 471.

both the mortgagor and subsequent mortgagees who are out of possession (*t*).

§278. *Time not extended by reason of disability.*

It was held by Jessel, M.R., in *Kinsman v. Rouse*, (*u*), that the time within which a mortgagor or any person claiming through him might sue for redemption was not to be extended by reason of his being under any disability. The disabilities provision (*r*) saves the right of any person "to bring an action to recover any land" if such person is under disability, but, as Jessel, M.R. pointed out, an action to redeem is not, properly speaking, "an action to recover land," and the section evidently refers to cases of ordinary ownership, where the rightful owner has been dispossessed. S. 20 (*w*) contains no qualification of the rights of the mortgagee as against the mortgagor and there is no reason for extending the disabilities provision to the case of a mortgagor.

The same result was reached in *Forster v. Patterson* (*x*) by Bacon, V.C., who laid emphasis on the order in which the sections are arranged. In the English statute the section relating to actions by a mortgagor *follows* the disabilities section, and Bacon, V.C., considered it clear that one is not at liberty to read into the special section relating to mortgagors a qualification derived from an earlier and more general section. In the English statute (37 & 38 V. c. 57, similar in arrangement to 3 & 4 W. 4, c. 27) the matter is made more plain because the disabilities section begins, "If at the time at which the right of any person to make an entry or distress,

(*t*) *Samuel Johnson & Sons v. Brock*, [1907] 2 Ch. 533; cf. *Wakefield and Barnsley Union Bank v. Yates*, [1916] 1 Ch. 452.

(*u*) 1881, 17 Ch.D. 104.

(*r*) R.S.O. 1914, c. 75, s. 40. See §275, *supra*.

(*w*) §277, *supra*.

(*x*) 1881, 17 Ch.D. 132.

or to bring an action or suit to recover any land or rent shall have first accrued as aforesaid"—thus referring back to the earlier sections. The Upper Canada statute 4 W. 4. c. 1, is similar in arrangement and wording to the English statutes.

In C.S.U.C. 1859, c. 88, s. 45, the similar expression "as hereinbefore mentioned" is used, and in R.S.O. 1877, c. 108, s. 43 "as aforesaid," but inasmuch as the section relating to actions by mortgagors precedes the disabilities section, the application of the latter section to the former is not necessarily excluded by the expressions quoted. In R.S.O. 1887, c. 111, s. 43, and R.S.O. 1897, c. 133, s. 43, the reference is made quite specific by the expression "as in sections 4, 5 and 6 mentioned," so that the application of the disabilities section to the redemption section is excluded, unless a suit for redemption should be held to be an "action to recover land," contrary to the opinion of Jessel, M.R., in *Kinsman v. Rouse*, *supra*. In 10 E. 7, c. 34, s. 40, and R.S.O. 1914, c. 75, s. 40, the more general expression "as herein mentioned" is substituted for the specific reference to the earlier sections, but it has been held that no change in meaning was intended (*y*).

In *Faulds v. Harper* a divisional court held that the disabilities section (R.S.O. 1877, c. 108, s. 43) applied to a suit for redemption (*z*). This decision was, however, reversed by the Court of Appeal (*a*). On appeal to the Supreme Court of Canada the judgment of the Court of Appeal was in turn

(*y*) *Smith v. Darling*, 1917, 55 Can. S.C.R. 82, 36 D.L.R. 1, affirming 36 O.L.R. 587, 32 D.L.R. 307.

(*z*) 1883, 2 O.R. 405, the case of *Hall v. Caldwell*, 1861, 7 U.C.L. J.O.S. 42, 8 U.C.L. J.O.S. 93, in the Court of Error and Appeal being followed in preference to *Kinsman v. Rouse*, *supra*, and *Forster v. Patterson*, *supra*.

(*a*) 1904, 9 O.A.R. 537. See especially the remarks of Patterson, J.A., at pp. 554 ff. with regard to the case of *Hall v. Caldwell*, and with regard to the effect of the changes of wording made in the successive revisions.

reversed (*b*), the decision being based chiefly on the ground that the action was virtually to impeach a purchase by a trustee for sale and that therefore the statute of limitations had no application. Strong, J. said (*c*):

"I think it well, however, to add that if I had to choose between the decisions in *Caldwell v. Hall* and those in *Kinsman v. Rouse* and *Forster v. Patterson*, I should certainly have agreed with the learned judges of the Divisional Court; for the reason that since the two cases in 17 Chancery Division, were decided, the House of Lords has held in *Pugh v. Heath*, 7 App. Cas. 235, that a foreclosure suit is an action for the recovery of land (*d*). This being so it follows *a fortiori* that a redemption suit is also an action or suit for the recovery of land. And it is impossible, without doing violence to the words of the statute, to hold that the saving of disabilities does not apply to any action or suit, as well in equity as at law, for the recovery of land."

Whether an action for redemption is or is not an action to recover land, the dictum of Strong, J. that the disabilities clauses of the statute apply to a suit for redemption was overruled, and the decision of the Court of Appeal in *Faulds v. Harper*, was followed, in the case of *Smith v. Darling* (*e*).

§279. *Nature of possession of mortgagee.*

Time will not run against the mortgagor so long as the possession of the mortgagee may be referred to another title and is not adverse. Thus, a person to whom property was mortgaged by the tenant for life and remainderman, after having been in possession for six years without any acknowledgment of the mortgagor's title, purchased the interest of the tenant for life, and then continued in possession for twenty years. It was held that such possession was not adverse during the existence of the life estate so purchased, and that the

(b) 1886, 11 Can. S.C.R. 639.

(c) *Ibid.*, at p. 655.

(d) As to the case of *Pugh v. Heath*, see §274, *supra*.

(e) 1917, 55 Can. S.C.R. 82, 36 D.L.R. 1, affirming 36 O.L.R. 587, 32 D.L.R. 307.

statute 3 & 4 W. 4, c. 27, s. 28 (*f*) was not, therefore, a bar to a suit for redemption by the remainderman or reversioner (*g*).

In *Faulds v. Harper* (*h*) an action for foreclosure had been brought and a decree had been made for a sale. The lands were sold pursuant to the decree and were purchased by one Harper, who acted for and in collusion with the mortgagee. Harper then conveyed to the mortgagee, who took possession and thenceforth dealt with the lands as absolute owner. In an action to redeem it was held that as the mortgagee had been in possession not as mortgagee but as purchaser, the statute of limitations did not apply. The action was virtually one to impeach a purchase by a trustee for sale, to which no statute of limitations was applicable.

Similarly if a mortgagee sells under a power of sale according to the terms of which he is an express trustee of the surplus, the statute of limitations does not apply to an action by the mortgagor to make the mortgagee account for the surplus (*i*).

A security for money lent was expressed in the form of a conveyance to the lender on trust to sell. He entered into possession and remained in possession for more than twenty years. His devisees in trust agreed to sell the mortgaged estate for a sum exceeding the amount owing for principal, interest and costs, and conveyed it to the purchaser by a deed in which the trust for sale was recited. It was held that the security was simply a mortgage, that the statute of limitations applied, that the devisees in trust sold as owners in fee and

(*f*) See now R.S.O. 1914, c. 75, s. 20, quoted in §277, *supra*.

(*g*) *Hyde v. Dalloway*, 1843, 2 Hare 528. See also *Raffety v. King*, 1836, 1 Keen 601.

(*h*) 1886, 11 Can. S.C.R. 639. See the cases cited by Strong, J. at pp 647 ff.

(*i*) See §261, *supra*.

that the mortgagors had no right to the surplus of the purchase money (*j*).

If, moreover, the mortgagee conveys the lands to a purchaser who goes into possession, the mortgagee may set up the possession of the purchaser in addition to his own possession, if any, as mortgagee, so as to bar the mortgagor's claim (*k*).

The possession required by the statute must be the possession of one person, or of several persons claiming one from or under another by conveyance, will or descent (*l*).

Where the solicitor of a mortgagor paid off the mortgage for his own benefit but did not take an assignment of the mortgage, it was held that his possession was the possession of his client and that time did not run against the client (*m*).

The words "possession or receipt of the profits" in R.S.O. 1914, c. 75, s. 20 (*n*) seem to include the case of the mortgagee receiving rent from a tenant in possession; receipt of such rent by a mortgagee for the statutory period will, it seems, bar the mortgagor's right to redeem (*o*).

Possession of lands must be considered in every case with reference to its peculiar circumstances, the character and value of the property, the suitable and natural mode of using it, and the course of conduct which its proprietor might reasonably be expected to follow with due regard to his own interest (*p*).

(*j*) *In re Alison, Johnson v. Mounsey*, 1879, 11 Ch.D. 284.

(*k*) *Bright v. McMurray*, 1882, 1 O.R. 172.

(*l*) *Doe d. Carter v. Barnard*, 1849, 13 Q.B. 945, at p. 952; *Dedford v. Boulton*, 1878, 25 Gr. 561.

(*m*) *Ward v. Carttar*, 1865, L.R. 1 Eq. 29.

(*n*) See §277, *supra*.

(*o*) *Ward v. Carttar*, 1865, L.R. 1 Eq. 29; *Markwick v. Hardingham*, 1886 Ch.D. 339; 19 Halsbury, Laws of England, p. 149, note (1).

(*p*) *Lord Advocate v. Lord Lovat*, 1886, 5 App. Cas. 273, at p. 288. *Kirby v. Cowderoy*, [1912] A.C. 599; *Martin v. Evans*, 1917, 39 O.L.R. 479, 37 D.L.R. 376.

Under a deed of conveyance, intended to be security only, of wild land in British Columbia without value, the grantee for over twenty years (*q*) before the grantor's suit for redemption performed the only act of possession of which the land appeared to be susceptible, namely, with the grantor's acquiescence he paid all the taxes upon it, and the grantor made no payment of principal or interest and had washed his hands of all connection with the property. It was held that the suit for redemption was barred (*r*).

It has been held that the possession of the mortgagee under the statute means actual adverse possession and that a mere constructive possession of vacant lands by reason of the default of the mortgagor will not operate to bar the mortgagor's right to redeem (*s*).

§280. *Possession of part of mortgaged lands.*

The rule which prevailed prior to 3 & 4 W. 4, c. 27, that no lapse of time barred the right of the mortgagor to redeem the whole of the mortgage¹ lands if he held possession of part (*t*) was abolished by s. 28 of the statute (*u*). Hence it has been held that where a mortgagee had been in possession of part of the lands for more than 20 years, the right of the

(*q*) The statute in question was R.S.B.C. 1897, c. 123, s. 40, similar in terms to R.S.O. 1914, c. 75, s. 20, quoted in §277, except that the period of limitation in the former statute is 20 years, that in the latter 10 years.

(*r*) *Kirby v. Cowderoy*, *supra*; *sed cf. McDonald v. McDonell*, 1864, 2 U.C.E. & A. 393.

(*s*) *Campbell v. Imperial Loan Co.*, 1908, 18 M.R. 144, overruling *Rutherford v. Mitchell*, 1904, 15 M.R. 390; *Creamer v. Gooderham*, 1914, 7 S.L.R. 173, 17 D.L.R. 235. If, however, mortgaged lands are left vacant after default, constructive possession is in the mortgagee so as to prevent his right to foreclose from being barred by lapse of time. See §270, *supra*.

(*t*) *Rakestraw v. Brewer*, 1728, Sel. Cas. Ch. 55, 2 P. Wms. 511.

(*u*) See now R.S.O. 1914, c. 75, s. 20, in §277, *supra*.

mortgagor to redeem that part was barred although he held possession of the remainder of the lands (*v*).

On the other hand, if a person has only a partial interest in the equity of redemption, for instance, as tenant, he has a right to pay the whole mortgage debt and receive a conveyance of the mortgaged lands, subject to the rights of redemption of other persons interested in the equity (*w*). This principle that the equity of redemption is an entirety which cannot be redeemed piecemeal or proportionately has been held to apply even where the person redeeming is entitled only to a share in the equity of redemption and the other persons interested have been barred by the statute of limitations (*x*).

§281. *Acknowledgment of title by mortgagee.*

In England prior to the passing of the statute 3 & 4 W. 4, c. 27, a slight act or admission, even oral, on the part of the mortgagee, constituted a sufficient acknowledgment of the mortgagor's title to preserve his right to redeem. That statute, however, required, that the acknowledgment should be in writing signed by the mortgagee, or the person claiming through him. The corresponding provision in Ontario is R.S.O. 1914, c. 75, s. 20, by which the mortgagor's action is barred at the end of ten years after the time at which the mortgagee obtained possession (*y*),

unless in the meantime an acknowledgment in writing of the title of the mortgagor, or of his right to redemption, has been given to the mortgagor or to some person claiming his estate, or to the agent of such mortgagor or person, signed by the mortgagee, or the person claiming through him, and in such case no action shall be brought, but within ten years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given.

(*v*) *Kinsman v. Rouse*, 1881, 17 Ch.D. 104.

(*w*) *Martin v. Miles*, 1884, 5 O.R. at p. 416.

(*x*) *Faulds v. Harper*, 1833, 2 O.R. 405, at p. 411, 11 Can. S.C.R. 639, at pp. 645, 646.

(*y*) See §277, *supra*.

S. 20 requires that the acknowledgment should be made to the mortgagor or to some person claiming his estate, or to the agent of such mortgagor or person (z).

If a mortgagor is a party to an assignment of the mortgage, this may be a sufficient acknowledgement of his title by the mortgagee (a). But a mere recital of the mortgage and an assignment of it, subject to the equity of redemption, by a deed to which the mortgagor or a person claiming his estate is not a party is not sufficient. The assignee is a person claiming, not the mortgagor's estate, but the mortgagee's estate (b).

If a mortgagee has entered into possession, accounts of his receipt of rent are not sufficient acknowledgment unless they are signed by him and kept for or communicated to the mortgagor or his agent (c). A letter written by the mortgagee to the mortgagor intimating that the former is willing to give an account is a sufficient acknowledgment (d). But a mere admission by the mortgagee that he holds under a mortgage title is not sufficient (e).

In order that the person to whom an acknowledgment is made should be the agent of the mortgagor, it is sufficient if he has acted or has been treated as such, or if he is known to be the agent of the mortgagor (f). On the other hand, a person who is not known to be the agent of the mortgagor cannot make a sufficient acknowledgment (g).

(z) In *re Metropolis, etc., Society*, *Garfield* (1874) 1 Ch. 698, at p. 705.

(a) *Batchelor v. Middleton*, 1848, 6 Hare. 75.

(b) *Lucas v. Danison*, 1843, 13 Sim. 584. See also *Markwick v. Hardingham*, 1880, 15 Ch.D. 339.

(c) In *Baker v. Welton*, 1845, 14 Sim. 420, this question was raised but not decided; see *Selden*, *Statutes relating to Real Property*, 2nd ed. 117; In *re Alison, Johnson v. Mounsey*, 1871, 12 Ch.D. 284; 19 Halsbury, *Laws of England*, 151.

(d) *Richardson v. Young*, 1870, L.R. 10 Eq. 275, L.R. 6 Ch. 479.

(e) *Thompson v. Bowyer*, 1863, 9 Jur. N.S. 80.

(f) *Trulock v. Rebov*, 1841, 12 Sim. 402; *Halsbury*, *loc. cit.* 151. In *re Metropolis, etc., Society*, *Garfield* (1874) 1 Ch. 698, at p. 705.

edgment by the agent of the mortgagee is not sufficient (g), but the mortgagee's acknowledgement will bind his lessee (h).

It has been said that an acknowledgment given by the mortgagee after the expiration of the statutory period is sufficient (i), but this construction appears to be unjustified (j). The words "in the meantime" in s. 20 seem to exclude an acknowledgment given after the period has expired. Under s. 24, relating to the right to recover money out of the land (k), an acknowledgment given after the expiration of the statutory period would appear to be too late, that section also containing the words "in the meantime." A similar result has been reached under s. 14, which does not contain the words "in the meantime" (l).

The case of an acknowledgment given to one of several mortgagors or by one of several mortgagees was provided for by s. 28 of the English statute of 1833, 3 & 4 W. 4, c. 27. The corresponding provisions in Ontario are now contained in R.S.O. 1914, c. 75, ss. 21 and 22, as follows:

21. Where there are more mortgagors than one, or more persons than one claiming through the mortgagor or mortgagees, such acknowledgment if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons.

22. Where there are more mortgagees than one, or more persons than one claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such

(g) *Richardson v. Younge*, 1871, L.R. 6 Ch. 478, at p. 480.

(h) *Ball v. Lord Riversdale*, 1816, Beatty 550.

(i) *Stanfield v. Hobson*, 1852, 3 De-G. M. & G. 620, affirming 16 Beav. 236.

(j) *Markwick v. Hardingham*, 1880, 15 Ch.D. 379; *Sanders v. Sanders*, 1881, 19 Ch.D. 373, at p. 379; *Shaw v. Coulter*, 1905, 11 O.L.R. 630; *Rutherford v. Mitchell*, 1904, 15 M.R. 390.

(k) See §265, *supra*.

(l) See §272, *infra*. The reason in the case of s. 14 is that by s. 16 the right and title to the land is extinguished after the expiration of the statutory period.

mortgagees or persons, shall be effectual only as against the person or persons so signing, and the person or persons claiming any part of the mortgage money or land or rent by, from or under him, or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money or land or rent; and where such of the mortgagees or persons as have given such acknowledgment are entitled to a divided part of the land or rent comprised in the mortgage or some estate or interest therein, and not to any ascertained part of the mortgage money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment, with interest, of the part of the mortgage money which bears the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent bears to the value of the whole of the land or rent comprised in the mortgage.

The provision that the acknowledgment of one of several mortgagees "shall be effectual only against the party signing the acknowledgment" is directed to the case of several mortgagees where an account taken against one will bind his interest but not the interest of any other person. The statute has no application to the case of a mortgage to several persons jointly as trustees. In the latter case there must be an acknowledgment by all (*m*).

B. THE LAND TITLES ACTS.

§282. *Possession adverse to registered title.*

It is provided in Ontario by the Land Titles Act, R.S.O. 1914, c. 126, s. 29, as follows:

29.—(1) A title to any land adverse to or in derogation of the title of the registered owner shall not be acquired by any length of possession.

(2) This section shall not prejudice, as against any person registered as first owner of land with a possessory title only (*n*), any adverse claim in respect of length of possession of any other person who was in possession of the land at the time when the registration of such first owner took place.

(*n*) *Richardson v. Younge*, 1871, L.R. 6 Ch. 478.

(*n*) An owner with a possessory title means a person who is registered as owner subject to any estate, right or interest adverse

It is provided in Manitoba by the Real Property Act, R.S.M. 1913, c. 171, ss. 82, 83 and 117, as follows:

82. Every certificate of title shall be void as against the title of any person adversely in actual occupation of and rightly entitled to the land at the time when such land was brought under the new system, and who continues in such occupation.

83. After land has been brought under this Act no title adverse or in derogation to the title of the registered owner shall be acquired by any length of possession merely.

117. In so far as any limitation is imposed by *The Real Property Limitation Act* on the rights, remedies or powers under mortgages, the same shall be held not to apply to mortgagees or encumbrances in mortgages or encumbrances heretofore or hereafter made under this Act, except as to liability under covenants for payment of any moneys secured thereby. This section shall be retroactive (*v*).

It is provided in Saskatchewan by the Land Titles Act, 1917, s. 61, as follows:

61.—(1) Every certificate of title shall be void as against the title of any person adversely in occupation of and rightly entitled to the land at the time when such land was brought under this Act.

(2) After land has been brought under this Act no title thereto adverse to or in derogation of the registered owner shall be acquired by possession: Provided, however, that nothing contained in this section shall operate to affect prejudicially any right or interest in land acquired prior to the nineteenth day of December, 1913 (*p*).

It is provided in British Columbia by the Land Registry Act, R.S.B.C. 1911, c. 127, s. 22, as follows:

22.—(2) Any certificate of indefeasible title issued under the provisions of this Act shall be void as against the title of any person adversely in actual possession of and rightly entitled to the hereditaments included in such certificate at the time of the application upon which such certificate was granted under this Act.

to or in derogation of his title and subsisting or capable of arising at the time of the registration of such owner (s. 12), such owner being in possession or the actual possession being in accordance with such owner's alleged title (r. 3, Land Titles Act).

(*v*) The original of this section was 7 & 8 E. 7, c. 52, s. 6.

(*p*) The original of this section was the statute 1913, c. 30, s. 2.

(3) After the issuance of a certificate of indefeasible title no title adverse or in derogation to the title of the registered owner shall be acquired by any length of possession merely.

In any of the provinces a registered title may be founded upon a title by possession, that is to say, the evidence of title submitted by a person applying to have the land brought under the land titles system may be merely evidence of actual, visible, continuous and undisturbed possession for a sufficient period under the statute of limitations (*q*). In Manitoba, Saskatchewan and British Columbia, the rights of a person who is in actual possession and who has acquired a title by possession (*r*) when an application is made by another person to have the land brought under the system are protected under the statutes above mentioned, even in the event of a certificate of title being granted to the applicant. There is no similar provision in Alberta or the Northwest Territories, but in view of the nature of the evidence required on the application it is difficult to conceive that the applicant would, except by fraud, be successful in getting himself registered as owner without an opportunity being given to the occupant to assert his rights (*s*). In Ontario, where likewise there is no provision expressly protecting the actual occupant in the case of an application by another person for registration as owner with an absolute title, the applicant would have the same difficulty in establishing his right to be registered in the event of there being an adverse claimant in actual possession (*t*).

In Manitoba, subject to s. 82, and in Saskatchewan, subject to s. 81, and in British Columbia, subject to s. 81, a certificate of title awards the date prior to which no person can acquire an adverse title by possession.

1. ALBERTA. S. 81, W.T.A.

2. BRITISH COLUMBIA. S. 81, W.T.A.

3. MANITOBA. S. 82, W.T.A.

sion, and under s. 83 of the Manitoba statute it has been held that a mortgagee cannot by length of possession acquire a title as against the mortgagor, the registered owner of the land (u). In Ontario the registration of a person as owner with an absolute title and in British Columbia (subject to s. 22, sub-s. 2) the registration of a person as owner with an indefeasible title affords the registered owner similar protection.

In Alberta and the Northwest Territories on the other hand the title of the registered owner is subject to be defeated by the adverse possession of another person, this case being an instance of the general rule that a certificate of title is not intended to be a continuing charter of title in favour of the registered owner but only so far as he is concerned, a certificate that upon its date he was the registered owner (v).

(u) *Smith v. Nations Trust Co.*, 1912, 45 Can. S.C.R. 618, 1 D.L.R. 698, affirming 20 M.L.R. 1.

(v) *Thomson v. Harris v. Keith*, 1911, 3 A.L.R. 222.

PART VII

MORTGAGE ACCOUNTS.

CHAPTER XXVII.

ACCOUNTING BETWEEN MORTGAGOR AND MORTGAGEE.

- §291. Right of mortgagor to an account, p. 573.
- §292. Taking of mortgage account, p. 574.
- §293. Items included in the account, p. 575.
- §294. Accounting by mortgagor in possession, p. 577.
- §295. Waste by mortgagor in possession, p. 577.

§291. Right of mortgagor to an account.

Proceedings for foreclosure or sale or for redemption involve the taking of an account as between the mortgagor and the mortgagee.

The form of endorsement on a writ of summons in an action for redemption includes a claim to have an account taken of what, if anything, is due on the mortgage, and the form of judgment for redemption directs that all necessary enquiries be made, accounts taken, costs taxed, etc. (a).

In an action for foreclosure or sale, if there is a reference as to subsequent encumbrancers the judgment directs that all necessary enquiries be made, accounts taken, costs taxed, etc., and if there is no reference the account is taken by the officer signing judgment. If the defendant disputes the amount of the plaintiff's claim he is entitled to four days' notice of the taking of the account (b).

If the mortgagee has sold the mortgaged property under his power of sale, whether he has been in possession or not

(a) See chapter 25, Action for Redemption, §258.

(b) See chapter 24, Action for Foreclosure or Sale, §236.

574 CHAPTER XXVII. ACCOUNTING BETWEEN PARTIES.

the mortgagor may bring an action for an account and to recover the surplus in the hands of the mortgagor (c).

§292. *Taking of mortgage account.*

The proceedings on a reference are governed in Ontario by rules 402 to 459. Some of the rules especially relating to the taking of accounts are as follows (d) :

411. The master may cause parties to be examined, and to produce books, papers and writings, as he thinks fit, and may determine what books, papers and writings are to be produced, and when and how long they are to be left in his office; or in case he does not deem it necessary that such books and papers or writings should be left or deposited in his office, he may give directions for the inspection thereof by the parties requiring the same, at such time and in such manner as he deems expedient.

417. Where an account is to be taken, the accounting party, unless the master otherwise directs, shall bring in the same in debit and credit form, verified by affidavit. The items on each side of the account shall be numbered consecutively, and the account shall be referred to by the affidavit as an exhibit, and shall not be annexed thereto.

418. The master may direct that in taking accounts, the books of account, in which the accounts required to be taken have been kept, or any of them, be taken as *prima facie* evidence of the truth of the matters therein contained.

419. Before proceeding to the hearing and determining of a reference, the master may appoint a day for the purpose of entering into the accounts and inquiries, and may direct the production and inspection of vouchers, and if deemed proper the cross-examination of the accounting party on his affidavit, with a view to ascertaining what is admitted and what is contested between the parties.

The mortgagor may "surcharge" and "falsify" (e). These terms have been defined as follows (f) :

(c) *Beatty v. O'Connor*, 1884, 5 O.R. 731, 747; *Reddick v. Traders Bank of Canada*, 1892, 22 O.R. 449; *Shepard v. Jones*, 1882, 21 Ch.D. 469.

(d) See also the rules relating to mortgage actions set out in chapter 24, *Action for Foreclosure or Sale*, §§239 and 241.

(e) *In re Webb, Lambert v. Stoll*, [1894] 1 Ch. 73.

(f) *Pitt v. Cholmondeley*, 1754, 2 Ves. Sen. 565.

"If any of the parties can show an omission for which credit ought to be given, that is a surcharge; if anything is inserted that is a wrong charge he is at liberty to show it, and that is a falsification."

It is provided by rule 420 as follows:

420. A party seeking to charge an accounting party beyond what he has in his account admitted to have received, shall give notice thereof to the accounting party, stating as far as possible the amount sought to be charged and the particulars thereof in a short and succinct manner. The master may direct any party who seeks to falsify an account to deliver particulars of the item objected to. The particulars shall refer to the item by number.

§293. Items included in the account.

The ordinary items of the account where the mortgagee has not taken possession (*q*) are the principal, the interest and the costs, and in addition there may be items of expense incurred by the mortgagee and chargeable to the mortgagor under the terms of the mortgage or by statute (*h*). The items of interest and costs are discussed in subsequent chapters. On the taking of the account in respect of a mortgage to secure repayment of a loan if the making of the loan is admitted the mortgagee must prove that the money was in fact paid to the mortgagor or to some other person upon the order of the mortgagor (*j*). The mortgagee is, however, entitled to

(i) As to the mortgagee's right to take an account, see §294.

(ii) E.g., insurance premiums. See chapter 34, *Fire Insurance*.
§372. Apart from power conferred by the terms of the mortgage or statute, the mortgagee cannot charge such premiums in his account except when he is mortgagee in possession, and then the premiums fall under "just allowances." *Dobson v. Land*, 1850 8 Har. 216. *Bellamy v. Brickend*, 1887 11 7. *Schofield v. Lockwood*, 1863, 11 W.R. 555; 21 Halsb. 100 (England).

(i) See chapter 20, *Interest*, and chapter 30, *Costs*.

(ii) See, e.g., *Black v. Hiebert*, 1907 13 Can. S.C.R. 557, in which a mortgage was declared fraudulent as against the mortgagor, the money having been advanced by the mortgagee, without the express authority of the mortgagor, to a lumber company which was supplying material to the contractors for a building on the mortgaged land.

the whole principal sum stated in the mortgage to have been advanced notwithstanding that at the time of the advance part of such sum was in fact deducted or withheld by way of bonus or commission or that the mortgagee obtained some other collateral advantage for which he might legitimately stipulate (*k*).

A mortgagee has a lien for moneys paid to redeem the mortgaged lands sold for taxes (*l*), but a mortgagee who has been a party to a breach of trust in taking the mortgage has no lien for money paid by him for taxes on the mortgaged lands or for money paid to redeem them from a sale for taxes, he being in the same position as a stranger paying taxes (*m*).

If the mortgagee has taken possession various additional items may enter into the account. The mortgagee may be entitled to credit for money paid by him for repairs and other purposes, and he will be chargeable with rents and profits which he has received or which he ought to have received (*n*).

It is provided in Ontario by rule 410 as follows (*o*):

410. Under an order of reference, the master shall have power:

- (a) To take accounts with rests or otherwise;
- (b) To take account of rents and profits received or which, but for wilful neglect or default, might have been received;
- (c) To set occupation rent;
- (d) To take into account necessary repairs, and lasting improvements, and costs and other expenses properly incurred otherwise, or claimed to be so;
- (e) To make all just allowances;
- (f) To report special circumstances;

(*k*) As to a stipulation for a collateral advantage, see chapter 3, *Legal Mortgage in Equity*, §26.

(*l*) *Wiley v. Ledyard*, 1883 10 O.P.R. 182.

(*m*) *Graham v. British Canada Loan and Investment Co.*, 1898, 12 M.R. 244; cf. *In re Leslie, Leslie v. French*, 1883, 23 Ch.D. 552; *Falcke v. Scottish Imperial Insurance Co.*, 1886, 34 Ch.D. 234.

(*n*) See chapter 28, *Mortgages in Possession*.

(*o*) It will generally be in the case of a mortgagee in possession that the provisions of this rule will be applied, and they will be discussed in chapter 28, §303. See also chapter 30, *Costs*, §321.

(g) And generally, in taking the accounts, to inquire, adjudge, and report as to all matters relating thereto, as fully as if the same had been specifically referred.

§294. *Accounting by mortgagor in possession.*

So long as the mortgagor or any person holding through or under him remains in possession, either by virtue of a provision in the mortgage authorizing him to do so until default or because the mortgagee refrains from disturbing his possession (p), he is entitled to the rents and profits of the land, and he is not accountable to the mortgagee for rents and profits received prior to the time when the mortgagee takes possession, even though the security is deficient (q).

Thus, a mortgage of a farm and farming stock will not prevent the mortgagor from selling the stock in the ordinary course of business without accounting for the proceeds (r), and a mortgagor is not liable even after default and before entry of the mortgagee to remove growing crops (s).

On the other hand the mortgagor is not entitled to credit for any money spent by him on the mortgaged land. Improvements made by him are simply improvements on his own land subject to the mortgage, not improvements made on land under the mistaken belief that the land is his (t).

§295. *Waste by mortgagor in possession.*

A mortgagor in possession of the mortgaged property is not liable to the mortgagee for allowing the property to de-

(p) As to the right of possession as between mortgagor and mortgagee, see chapter 22, *Action for Possession*, §212. As to the rights of a mortgagor in possession, cf. §215.

(q) *Ex parte Wilson*, 1815, 2 Ves. & B. 252, 18 R.C. 382; *Yorkshire Banking Co. v. Mullan*, 1887, 35 Ch.D. 125; *Wafer v. Taylor*, 1852, 9 U.C.R. 605.

(r) *National Mercantile Bank v. Harbison*, 1880, 5 Q.B.D. 177.

(s) *Ex parte National Mercantile Bank*, *re Phillips*, 1880, 16 Ch.D. 104.

(t) *Hislop v. Joss*, 1907, 3 O.L.R. 261.

teriorate, but he must not commit any act which is destructive or permanently injurious thereto, if the security is insufficient or will be rendered insufficient by such act (*u*).

The mortgagor is not entitled to take part of the inheritance by cutting timber, opening mines, etc., but as far as the common law is concerned the only remedy of the mortgagee is to take possession. Equity has improved and extended the mortgagee's remedy but grants the remedy only where the effect of the mortgagor's acts is to imperil the security. It will not interfere unless the security is scanty or will be rendered scanty by the waste in question, and even if the security is scanty it will not interfere if the waste is meliorating waste, that is, of a kind which increases the value of the property (*v*).

If the person in possession of the mortgaged land commits waste so as to imperil the security, as by cutting standing timber, he is liable to account therefor to the mortgagee, and where there is no evidence of bad faith the injury actually sustained by such waste is the measure of damages (*w*). The liability to account is not usually important in the case of the mortgagor himself as he is almost always personally liable for the whole mortgage debt, but the mortgagee has also the right of compelling a purchaser of the land or subsequent mortgagee in possession to account for waste committed by him (*x*) or of obtaining payment from the purchaser of timber sold and removed (*y*). The registration of a mortgage con-

(*u*) Indian Transfer of Property Act, 1882, s. 66, in Appendix III. to Strahan, *Law of Mortgages*, 2nd ed., pp. 223-4.

(*v*) Strahan, *Law of Mortgages*, 2nd ed., pp. 15, 45-46; *King v. Smith*, 1843, 2 Hare 239, 18 R.C. 98; *Wafer v. Taylor*, 1852, 9 U.C.R. 609; *Russ v. Mills*, 1859, 7 Gr. 145; cf. *Hixon v. Reaveley*, 1904, 9 O.L.R. 6.

(*w*) *McLean v. Burton*, 1876, 24 Gr. 134.

(*x*) *McLeod v. Avey*, 1888, 16 O.R. 365.

(*y*) *Scott v. Vosburg*, 1880, 8 O.P.R. 336.

stitutes notice of the mortgage to a subsequent purchaser of timber standing on land included in the mortgage (2).

The mortgagee is entitled to an injunction restraining the person in possession from committing waste which may imperil the security (a). Such an injunction may also be granted at the suit of an execution creditor (b).

(s) *McLean v. Burton, supra.*

(a) *Farrant v. Lovell*, 1759, 3 Atk. 723; *King v. Smith, supra*; *McLean v. Burton, supra*; *McLeod v. Avey, supra.*

(b) *Wason v. Carpenter*, 1867, 13 Gr. 329.



CHAPTER XXVIII.

MORTGAGEE IN POSSESSION.

- §301. When mortgagee is deemed to be in possession, p. 580.
- §302. Rights of mortgagee in possession, p. 582.
- §303. Right to reimbursement for expenses incurred, p. 584.
- §304. Obligations of mortgagee in possession, p. 588.
- §305. Liability for occupation rent, p. 589.
- §306. Liability for rents and profits, p. 591.
- §307. Liability for waste or deterioration, p. 594.
- §308. Manner of taking accounts, p. 595.

§301. *When mortgagee is deemed to be in possession.*

A mortgagee takes possession (*a*) when he deprives the mortgagor of the control and management of the mortgaged property. If the actual occupant is the mortgagor or a tenant under a lease from the mortgagor made after the mortgage, the mortgagee, if he is entitled to possession, may take possession by ejecting the occupant (*b*). If the occupant is a tenant under a lease which is paramount to the mortgage, the mortgagee may, if he is entitled to possession as between himself and the mortgagor, take possession by requiring the tenant to pay the rents and profits to the mortgagee or his agent instead of paying them to the mortgagor (*c*). The mere fact that the mortgagee intercepts the rents and profits after they have been paid by the tenants to the mortgagor's agent does not take the mortgaged property out of the mortgagor's con-

(*a*) As to the right to possession as between mortgagor and mortgagee, see chapter 22, *Action for Possession*, §212.

(*b*) See chapter 15, *Lessee of Mortgaged Land*, §141.

(*c*) *Noyes v. Pollock*, 1884, 32 Ch.D. 53, at p. 61. See chapter 15, §142, as to the right to require payment of rent by a tenant under a paramount lease.

trol. "In order to hold that a mortgagee not in actual possession is in receipt of the rents and profits, in my opinion, it ought to be shown not only that he gets the amount of the rents paid by the tenants, even although he gets their cheques or their cash, but that he receives it in such a way that it can be properly said that he has taken upon himself to intercept the power of the mortgagor to manage his estate, and has himself so managed and received the rents as part of the management of the estate." (*d*).

If a person, though in fact a mortgagee, enters into possession of the rents and profits in another character, he cannot be charged as a mortgagee in possession. His receipt of the rents and profits in the particular character of mortgagee in possession must be distinctly established. A person who purchases a property from a mortgagee and goes into possession, supposing himself to be the owner, if it afterwards appears that he is not validly clothed with that character, but only holds a lien on the property in virtue of the money advanced by him on the supposed purchase, cannot therefore be so treated as to make him liable to render accounts as an ordinary mortgagee in possession. It is essential to the creation of such liability that he should have known that he was in possession as mortgagee (*e*).

So, where a mortgagee acted as owner after final order of foreclosure regularly obtained, and the foreclosure was afterwards opened by the court in the exercise of its equitable jurisdiction, it was held that prior to the opening of the fore-

(*d*) *Noyes v. Pollock*, 1884, 32 Ch.D. 53, at pp. 61, 64. The appointment of a receiver by a mortgagee otherwise than under statutory or express power to appoint a receiver will constitute the mortgagee a mortgagee in possession. See chapter 32, *Appointment of Receiver*, §354.

(*e*) *Parkinson v. Hanbury*, 1867, L.R. 2 H.L. 1, 18 R. C. 411; cf. *Carroll v. Robertson*, 1868, 15 Gr. 173 at p. 176; *Fawcett v. Burwell*, 1880, 27 Gr. 445.

closure the mortgagee was not chargeable as a mortgagee in possession—as owner he was under no obligation to repair or keep up buildings or to obtain tenants (*f*).

So, if a mortgagee enters into possession as tenant for life or as purchaser of the equity of redemption, or as trustee or agent for the mortgagor, or in any character other than that of mortgagee, he will not be chargeable as mortgagee in possession (*g*). Generally, however, a mortgagee who enters into possession will be treated as mortgagee in possession, and be chargeable as such, though he calls himself trustee, manager or agent of the mortgagor (*h*).

A mortgagee will not be liable to account as a mortgagee in possession merely because the mortgage contains an attornment clause (*i*).

Even if a mortgage is in the form of a conveyance with a trust for sale, the mortgagee in possession is not an express trustee of the property for the mortgagor within the meaning of the equitable rule that time does not run in favour of an express trustee (*j*).

§302. *Rights of mortgagee in possession.*

A mortgagee lawfully in possession has, generally speaking, the rights of any owner of land for the purposes of the due management and preservation of the property, subject to the liability to redemption and accounting (*k*), but apart from

(*f*) *Williams v. Box* (no. 2), 1913, 24 M.R. 31, 15 D.L.R. 261.

(*g*) *Kensington (Lord) v. Bouverie*, 1855, 7 DeG. M. & G. 134, at p. 156.

(*h*) *Trimleston (Lord) v. Hamill*, 1810, 1 Ball & B. 377.

(*i*) *Stanley v. Grundy*, 1883, 22 Ch.D. 478, 3 R.C. 569; see also chapter 33, *Attornment and Distress*, §362.

(*j*) *In re Alison*, *Johnson v. Mounsey*, 1879, 11 Ch.D. 284; cf. *Ashworth v. Lord*, 1887, 36 Ch.D. 545.

(*k*) As to accounting generally, see chapter 27, *supra*; as to the liability for waste or deterioration, see §307, *infra*.

express or statutory authority he cannot, without the mortgagor's consent, make leases which will be binding on the mortgagor after redemption (*l*).

The mortgagee is entitled to take the rents and profits by virtue of the legal ownership or equitable interest which the mortgage confers upon him (*m*). The rents received by the mortgagee are applicable in the first instance to payment of the current outgoings, such as rents, rates and taxes, repairs, insurance premiums and the interest on prior encumbrances (*n*), and the balance is then applicable, firstly, in payment of interest on the mortgage debt and on expenses of improvements and other expenses which the mortgagee is entitled to add to the mortgage debt (*o*), and, secondly, in payment of the principal and of capital expenditure added to principal (*p*). Where, however, a mortgagee in receipt of the rents and profits sold goods to the mortgagor from time to time and the latter upon a settlement of accounts assented to the rents and profits being applied first in payment of the account for goods sold, it was held that an encumbrancer whose rights accrued after the settlement could not complain of such application of the rents and profits (*q*).

A mortgagee taking possession of the lands is entitled as against the mortgagor to all growing crops and all produce of the lands, and if possession be lawfully demanded by the mortgagee any person refusing possession may be restrained

(*l*) *Chapman v. Smith*, [1907] 2 Ch. 97; see also chapter 15, *Lessee of Mortgaged Land*, §144.

(*m*) *Cockburn v. Edwards*, 1881, 18 Ch.D. 449, at p. 457. See also chapter 15, §§141 and 142.

(*n*) *Bompas v. King*, 1886, 33 Ch.D. 279.

(*o*) As to the right to reimbursement for expenses incurred, see §303, *infra*.

(*p*) 21 Halsbury, *Laws of England*, pp. 195-197. As to the liability to account for rents and profits, see §306, *infra*.

(*q*) *Mitchell v. Saylor*, 1901, 1 O.L.R. 458.

from cutting or removing the crops (*r*). A mortgagee of the land is entitled to take possession of growing crops as against a subsequent chattel mortgagee thereof, but where a mortgagee of the land purchases the equity of redemption from the mortgagor whereby the mortgage becomes merged, an intervening chattel mortgagee is entitled to the growing crops as against a lessee of the mortgagee of the land (*s*). A mortgagor after default is so far as crops growing upon the mortgaged land are concerned in the position of a tenant at sufferance, and cannot by giving a chattel mortgage upon the crops confer a title thereto upon the chattel mortgagee to the prejudice of the mortgagee of the land or anyone claiming under him who has entered into possession of the land before the crop is harvested (*t*).

If the property covered by the mortgage includes a business carried on upon the mortgaged premises the mortgagee is entitled to carry on the business for a reasonable time and to use the name of the mortgagor for that purpose so that the property may be sold as a going concern, but the mortgagee will be liable for gross negligence in management (*u*), and will be personally liable upon new contracts made by him (*v*).

§303. *Right to reimbursement for expenses incurred.*

When during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property, he may spend such money as is necessary

(*r*) *Moore v. Shelley*, 1883, 8 App. Cas. 285; *Bagnall v. Villar*, 1879, 12 Ch.D. 812.

(*s*) *Cameron v. Gibson*, 1889, 17 O.R. 233.

(*t*) *Bloomfield v. Hellyer*, 1895, 22 O.A.R. 232; *Laing v. Ontario Loan and Savings Co.*, 1881, 46 U.C.R. 114.

(*u*) *Cook v. Thomas*, 1876, 24 W.R. 427; *Chaplin v. Young* (no. 1), 1864, 33 Beav. 330; *Wragg v. Denham*, 1836, 2 Y. & C. Ex. 117.

(*v*) *Burton Boulton and Hayward v. Bull*, [1895] 1 Q.B. 276.

- (a) For the due management of the property and the collection of the rents and profits thereof;
- (b) For its preservation from destruction, forfeiture or sale;
- (c) For supporting the mortgagor's title to the property;
- (d) For making his own title thereto good against the mortgagor;
- (e) When the mortgaged property is a renewable leasehold, for the renewal of the lease;

and may, in the absence of contract to the contrary, add such money to the principal money," with interest (*w*).

In Ontario it is provided by rule 410 that under an order of reference, the master may take into account necessary repairs, and lasting improvements, and costs and other expenses properly incurred otherwise, or claimed to be so (*x*).

A mortgagee in possession is entitled to credit in his account of rents and profits for payments properly made for purposes incident to his possession (*y*). In the case of substantial repairs and improvements, the mortgagee, in order to entitle himself to reimbursement for money expended by him must establish either that the mortgagor agreed to the expenditure of the money (whether expressly or, after notice, by acts denoting acquiescence), or that the outlay was a reasonable one increasing the selling value of the property or necessary for the purpose of keeping the property in a proper state of repair (*z*).

(*w*). Indian Transfer of Property Act, 1882, s. 72, quoted in appendix III. to Strahan, *Law of Mortgages*, 2nd ed., pp. 228-9. As to interest on money expended by the mortgagee, see *Eyre v. Hughes*, 1876, 2 Ch.D. 148, at pp. 163-4, 18 R.C. 385, at pp. 398-400.

(*x*) The whole rule is quoted in chapter 27, *Accounting between Mortgagor and Mortgagee*, §293.

(*y*) *White v. City of London Brewery Co.*, 1889, 42 Ch.D. 237.

(*z*) *Sandon v. Hooper*, 1843, 6 Beav. 246; *Paul v. Johnson*, 1866, 12 Gr. 474; *Shepard v. Jones*, 1882, 21 Ch.D. 169; *Henderson v. Ast*.

Where the mortgagee in possession had planted fruit and ornamental trees suitable for carrying out improvements commenced by the mortgagor, he was allowed the cost price of the same and a reasonable amount for care and cultivation, but not the value thereof at the time of redemption (*a*). A mortgagee in possession of a grist mill and other property erected a carding and fulling mill. This was disallowed to him as being an improvement that a mortgagee could not make without consent (*b*).

In a case where the mortgagors released their equity of redemption to the mortgagee, and the mortgagee subsequently signed a memorandum agreeing to reconvey upon being paid principal and interest and all costs of improvements made by her, it was held in a suit for redemption that the mortgagee was entitled to recover for all permanent and lasting improvements, even although the estate might not have been increased in value to an amount equal to the sum expended thereon (*c*).

The owner of certain lands after a treaty for a loan thereon conveyed the lands absolutely to the person making the loan and received back a bond conditioned to reconvey the property on payment of a certain sum at the end of two years. Default was made in such payment. The court declared the deed to have been made as security only, the bond to reconvey containing an undertaking by the vendor to pay the stipulated amount, and it appearing that the value of the property greatly exceeded the sum paid for the alleged purchase thereof; but under the circumstances the court charged the mortgagee with such rents and profits as were actually

wood, [1894] A.C. 150; *Waterloo Manufacturing Co. v. Holland*, 1917, 10 S.L.R. 300, 36 D.L.R. 216; *Laws v. Toronto General Trusts Corporation*, 1904, 8 O.L.R. 522.

(*a*) *Paul v. Johnson*, 1866, 12 Gr. 474.

(*b*) *Kerby v. Kerby*, 1856, 5 Gr. 587; *Manitoba Lumber Co. v. Emerson*, 1913, 18 B.C.R. 96, 14 D.L.R. 390.

(*c*) *Brotherton v. Hetherington*, 1876, 23 Gr. 187.

received, or an occupation rent, if in actual possession, not with such rents as might have been received; and the court also allowed him for repairs and permanent improvements (*d*).

Where a mortgagee is charged with rents and profits received from improvements made by himself he should be allowed the expense of such improvements to a corresponding amount (*e*).

Improvements made under the belief of absolute ownership are allowed more liberally than to a person who makes improvements knowing that he is but a mortgagee (*f*).

Where it is found that the mortgagee in possession on taking his accounts has suffered a loss by reason of the rents not being sufficient to pay the expenses of management, he is entitled to be allowed out of the proceeds of the sale of the property what he has lost (*g*).

In taking the account in the master's office the plaintiff as assignee of the mortgage claimed to be entitled to moneys paid by the mortgagee to redeem the mortgaged lands which had been sold for arrears of taxes. It was held that money so paid was a lien on the land, and the mortgagee had a right to claim the same as a just allowance, with interest from the date of
+ (*h*).

Second mortgagee in possession will not be allowed for improvements as against a first mortgagee (*i*).

If the mortgagee appoints a receiver in circumstances

(*d*) *Bullen v. Renwick*, 1862, 9 Gr. 202.

(*e*) *Constable v. Guest*, 1858, 6 Gr. 510; cf. *Patterson v. Dart*, 1911, 24 O.L.R. 609.

(*f*) *Carroll v. Robertson*, 1868, 15 Gr. 173; *McLaren v. Fraser*, 1870, 17 Gr. 567; see, however, *Patterson v. Dart*, 24 O.L.R. 609, at p. 620.

(*g*) *Bompas v. King*, 1886, 33 Ch.D. 279; *Rice v. George*, 1872, 19 Gr. 174.

(*h*) *Wiley v. Ledyard*, 1883, 10 O.P.R. 182.

(*i*) *Landowners, etc., Co. v. Ashford*, 1880, 16 Ch.D. 412.

which render the appointment justifiable, he will be allowed in his accounts the remuneration and proper expenses of such receiver (*j*).

§304. *Obligations of mortgagee in possession.*

The mortgagee, having asserted his common law right to possession and having taken the management of the property out of the mortgagor's hands, must himself assume the responsibilities of management. He must manage the property as a person of ordinary prudence would manage it if it were his own, and so long as the equitable right to redeem subsists, is liable to be called to account in respect of his management (*k*).

In the absence of an express stipulation : mortgagee in possession cannot charge remuneration for his personal trouble in managing the property or collecting the rents (*l*). He may, however, employ an agent if the management of the property is troublesome, and will in such case be entitled to credit in the account for reasonable payments for the services of the agent (*m*).

(*j*) *Chambers v. Goldwin*, 1804, 9 Ves. 254; *Davis v. Dendy*, 1818, 3 Madd. 170. Cf. chapter 32, *Appointment of Receiver*, §354.

(*k*) As to the general liability of the mortgagee to account, see chapter 27, *Accounting between Mortgagor and Mortgagee*. The special grounds of liability of a mortgagee in possession will be discussed in §§305 ff.

(*l*) *In re Wallis, Ex parte Lickorish*, 1890, 25 Q.B.D. 176, at pp. 180, 182; *Eyre v. Hughes*, 1876, 2 Ch.D. 148, 18 R.C. 385. An express stipulation for remuneration would formerly have been held invalid as a collateral advantage, but a stipulation for a collateral advantage is now valid if it is not oppressive. See chapter 3, *Legal Mortgage in Equity*, §25.

(*m*) It is not a matter of course that a mortgagee is entitled to pay an agent to collect the rents for him, though some of the judges in modern times have been inclined to show great leniency in this respect. *Union Bank of London v. Ingram*, 1880, 16 Ch.D. 53, at p. 56.

A mortgagee, having once taken possession, cannot whenever he chooses and without the consent of the mortgagor (*n*), relieve himself of the liabilities of a mortgagee in possession by giving up possession, and the court will not usually appoint a receiver so as to relieve him (*o*).

If a mortgagee in possession assigns the mortgage without the concurrence or consent of the mortgagor, he does not thereby relieve himself from liability for future rents and profits if the assignee fails to account for them (*p*), but the court may relieve him from liability by appointing a receiver or directing an assignment (*q*).

§305. *Liability for occupation rent.*

It is provided in Ontario by rule 410 that upon an order of reference the master may "set occupation rent" (*r*).

If a mortgagee is himself in actual occupation of any portion of the mortgaged property, but not otherwise, he will be chargeable with an occupation rent based upon the value of the property (*s*), a fair rental such as an ordinary tenant might be expected to pay (*t*). He will not be liable for occupation rent if he lets a lessee into possession before the

(*n*) *Rice v. George*, 1872, 19 Gr. 174.

(*o*) *In re Prytherch*, *Prytherch v. Williams*, 1889, 42 Ch.D. 590; *County of Gloucester Bank v. Rudry Merthyr, etc., Colliery Co.*, [1895] 1 Ch. 629. As to the appointment of a receiver generally, see chapter 32, *infra*.

(*p*) *National Bank of Australasia v. United Hand-in-Hand and Band of Hope Co.*, 1879, 4 App. Cas. 391; *Hall v. Heward*, 1886, 32 Ch.D. 430. For this reason a mortgagee in possession is not bound under s. 3 of the Mortgages Act to execute an assignment of the mortgage instead of reconveying to the person entitled; see chapter 20, *Right to Assignment of Mortgage*, §196.

(*q*) *Hall v. Heward* *supra*.

(*r*) See chapter 27, §293.

(*s*) *Lord Trimleston v. Hamill*, 1810, 1 Ball & B. 377.

(*t*) *Coldwell v. Hall*, 1862, 9 Gr. 110; *White v. City of London Brewery Co.*, 1889, 42 Ch.D. 237.

lessee is entitled to possession under his lease, although he may be liable for his wilful default in not getting rent which he should have got (u).

As between mortgagor and mortgagee there is nothing to prevent the mortgagee from taking possession at a fair and reasonable rent agreed upon between them. In such a case the mortgagee is not a "mortgagee in possession" in the technical sense of the term. A subsequent encumbrancer, however, who becomes such before the first mortgagee enters into possession, is not bound by such an arrangement; and the master may charge the first mortgagee with a fair occupation rent although it exceeds that stipulated for (v).

Where a mortgagee is in occupation of the mortgaged premises, the master should charge him with occupation rent up to the day appointed for payment; so, where it appeared that a mortgagee in such circumstances had been charged with occupation rent only to the date of the master's report, and had since continued in possession, the final order for foreclosure was refused (w).

The holder of a mortgage went to reside with his sister, the widow of the mortgagor, upon the mortgaged premises, but asserted no claim or right to possession as mortgagee until some years afterwards, when the widow, being about to marry, desired her brother to leave. The brother was charged with occupation rent from that period, not from the time of his going to reside on the property; and it was held that such assertion of right had not the effect of referring back his possession to the time when he first acquired the right or went to reside on the property (x).

(u) *Shepard v. Jones*, 1882, 21 Ch.D. 469.

(v) *Court v. Holland*, 1881, 29 Gr. 19; *Gilmour v. Roe*, 1874, 21 Gr. 284.

(w) *Pipe v. Shafer*, 1868, 1 Chy. Ch. (Ont.) 251.

(x) *Paul v. Johnson*, 1866, 12 Gr. 474.

§306. *Liability for rents and profits.*

It is provided in Ontario by rule 410 that under an order of reference the master may, *inter alia*, take account of any rents and profits received or which, but for wilful neglect or default, might have been received (*y*).

A mortgagee who enters into possession or receipt of the rents and profits of the mortgaged property must account not only for what he actually receives, but for what he might have received but for his wilful default (*z*), that is for what he might have received but for his negligence or mismanagement (*a*).

Where mortgagees in possession, who were brewers, let the premises with a restriction that the tenant should take his supply of beer entirely from them, it was held that the mortgagees must account for such additional rent as they would have received if the premises had been let without restrictions, but not for the profit which they made by the sale of beer to the tenant (*b*).

A mortgagee is so accountable not only to the mortgagor but also to subsequent mortgagees and to creditors and others claiming under the mortgagor. A mortgagee in possession liable to a subsequent encumbrancer if after notice from him he pays the surplus rents and profits to the mortgagor (*c*).

If a mortgagee in possession execute an assignment of his mortgage he will continue to be liable for the rents and profits if the assignee fails to account for them (*d*).

(*y*) See chapter 27, §293.

(*z*) *Parkinson v. Hanbury*, 1867, L.R. 2 H.L. 1, at p. 15, 18 R.C. 411, at p. 425.

(*a*) *Mayer v. Murray*, 1878, 8 Ch.D. 424; *Merriam v. Cronk*, 1874, 21 Gr. 60; *Coldwell v. Hall*, 1862, 9 Gr. 110, at p. 112.

(*b*) *White v. City of London Brewery Co.*, 1889, 42 Ch.D. 237.

(*c*) *Berney v. Sewell*, 1820, 1 J. & W. 647.

(*d*) See §304, *supra*.

The assignee of a mortgagee in possession is likewise accountable to the mortgagor and those claiming under him not only for the rents and profits received by himself but also for those received by the mortgagee and intermediate assignees (e). Where one of several devisees claimed to be solely entitled and mortgaged the property, and the mortgagees entered into receipt of the rents, it was held that they must account to the other devisees for their shares of the rent (f).

A mortgagee, his power of sale on default having arisen, sold the mortgaged premises ostensibly to a third person but in reality to himself. Subsequently he sold a portion of the premises to a third person for an amount in excess of the mortgage debt; and he continued in possession of the remaining part, and received rent. It was held that the sale by the mortgagee to himself was abortive, and that he was a mortgagee in possession, and should account to the mortgagor for the surplus from the second sale, together with the rent and interest on both sums and costs (g).

A derivative mortgagee is bound to account to his assignor for all profits made by him. Thus where a derivative mortgagee by representing himself to be the absolute mortgagee obtained an assignment of the equity of redemption which he subsequently re-sold at a profit, he was held bound to account for the profits so made (h).

In a redemption suit by the second mortgagee against the first in which it appeared that the equity of redemption had become vested in the first mortgagee, and that he had entered into possession and had cut and removed timber to a greater value than the amount due on his mortgage, it was held that

(e) *Chambers v. Goldwin*, 1804, 9 Ves. 254.

(f) *McIntosh v. Ontario Bank*, 1872, 19 Gr. 155.

(g) *Mitchell v. Kinnear*, 1897, 1 N.B. Eq. 427.

(h) *Wilkins v. McLean*, 1885, 10 O.R. 58; 13 O.A.R. 467; 14 Can. S.C.R. 22, *sub nom.* *McLean v. Wilkins*.

he was bound to account for the value of only such timber and occupation rent as was taken or received by him as mortgagee, and not for what he took or received as owner of the equity of redemption, but that the second mortgagee might ask for a receiver (*i*).

The rule is that when a mortgagee enters into possession he does so for the purpose of recovering both his principal and interest. Equity regards the estate only as a security for the money due on the mortgage, and the court requires the mortgagee to be diligent in realizing the amount due, in order that he may restore the estate to the mortgagor who is in equity the person entitled to it. Nevertheless the mortgagee will not be held responsible for any greater rent than he has actually received, unless it is clearly established in evidence that he knew a greater rent might and could have been obtained, and that he refused or neglected to obtain the same (*j*).

A mortgagee taking possession and evicting a tenant of the mortgagor who is willing to remain and pay rent will be held accountable for the rents from that time (*k*). Where after default was made in payment of a mortgage, a tenant put in possession by the mortgagor promised to pay the mortgagee rent, but failed to do so, it was held that the mortgagee was not chargeable with such rent (*l*).

Where a mortgagee has taken possession of part only of the mortgaged lands he will not be held to be in constructive possession of the whole so as to render him liable to account to subsequent encumbrancers for the rents and profits of the

(*i*) *Steinhoff v. Brown*, 1865, 11 Gr. 114.

(*j*) *Merriam v. Cronk*, 1874, 21 Gr. 60; *Waddell v. McColl*, 1868, 14 Gr. 211; *Penn v. Lockwood*, 1850, 1 Gr. 547; *Earle v. Harrison*, 1909, 4 N.B. Eq. 196.

(*k*) *Penn v. Lockwood*, 1850, 1 Gr. 547.

(*l*) *Waddell v. McColl*, 1868, 14 Gr. 211.

lands which still remain in the possession of the mortgagor (*m*).

Where one of two co-owners of a patent mortgaged his share to the other, and the mortgagee worked the patent for his own benefit, it was held that as he had a perfect right to do so in his character as co-owner, he was not liable to account as mortgagee in possession of the mortgaged share in respect to the profits received by him (*n*).

§307. *Liability for waste or deterioration.*

A mortgagee in possession is bound to keep the premises in reasonable repair so far as the rents and profits will enable him to do so, and he will be liable for deterioration occasioned by his gross or wilful negligence, but he will not be liable merely because after a long period of possession the premises are not in as good condition as he found them (*o*).

Where a mortgagee of leaseholds took possession of unfinished buildings and did nothing to complete them whereby the lease became forfeited he was held liable as for wilful default (*p*). But a mortgagee is only liable for neglect to repair if there is a surplus of rents after payment of interest on the mortgage; he is not bound to expend his own money on repairs (*q*), and a mortgagee is not bound to lay out money on the property except for necessary repairs, although, as already pointed out, he will be allowed in certain cases for improvements (*r*). Although he may replace decayed build-

(*m*) *Ex parte Hooman, In re Vining*, 1870, L.R., 10 Eq. 63.

(*n*) *Steers v. Rogers*, [1893] A. C. 232.

(*o*) *Russell v. Smithies*, 1792, 1 Anst. 96, 9 R.C. 508; *Wragg v. Denham*, 1836, 2 Y. & C. Ex. 117.

(*p*) *Perry v. Walker*, 1855, 24 L.J. Ch. 319.

(*q*) *Richards v. Morgan*, 1753, 4 Y. & C. Ex. 570 (Appendix).

(*r*) *Godfrey v. Watson*, 1747, 3 Atk. 517.

ings by new buildings he is not bound to expend money in rebuilding (s).

A mortgagee in possession is also liable for waste (t), but where the mortgage security is insufficient the mortgagee is entitled to make the most of the property for the purpose of realizing what is due to him. He may in that case cut timber, open mines, etc., subject always to the right of the mortgagor to call him to account and at his own risk in case he expends money unprofitably (u).

The mortgagee of a term of years, being in possession, will at the suit of the mortgagor be restrained from felling timber, even though he may have obtained the consent of the reversioner (v).

§308. *Manner of taking accounts.*

It is provided in Ontario by rule 410 that under an order of reference the master may take the account with rests or otherwise (w).

Taking an account with rests means either that the accounting party is charged with compound interest on the amount with which he is chargeable or that the surplus of the amount with which he is chargeable remaining after satisfaction of the interest due to him is applied in reduction of the principal. The amalgamation of principal and interest, or the application of money with which the accounting party is

(s) *Marshall v. Cave*, 1825, 3 L.J. Ch. 57; *Moore v. Painter*, 1842, 6 Jur. 903.

(t) *Hanson v. Derby*, 1700, 2 Vern. 392, 9 R.C. 508; *Taylor v. Mostyn*, 1886, 33 Ch.D. 226.

(u) *Brethour v. Brooke*, 1893, 23 O.R. 658, 21 O.A.R. 144; *Millett v. Davey*, 1862, 31 Beav. 470.

(v) *Chisholm v. Sheldon*, 1850, 1 Gr. 318.

(w) As to the proceedings on a reference to take accounts, see chapter 27, *Accounting between Mortgagor and Mortgagee*, §292. As to rule 410, see §293.

chargeable to reduction of principal, as the case may be, may take place yearly or at any periods more or less frequent, and these periods are called "rests."

The usual practice is not to take an account with rests as against a mortgagee in possession if there was interest in arrear when he took possession (*x*), or if it was necessary in the particular circumstances for him to take possession for his own protection (*y*). In neither case does the taking of possession show an intention on the mortgagee's part to accept payment of his principal "by dribblets," and he is not obliged to accept payment in that way, whereas if he takes possession when no interest is in arrear and no special circumstances exist which make it necessary for him to protect himself by taking possession, he manifests an intention to accept payments on account of principal.

If a mortgagee goes into possession when there is interest in arrear, so that he is not liable to account with rests, he does not become so liable when the arrears of interest are paid off or till after the whole of the mortgage debt has been satisfied, but from the time when it is ascertained that the mortgage debt has been satisfied the accounts will be taken with rests (*z*).

Where the account is taken with rests the rule is that, in the absence of any express appropriation of payments to prin-

(*x*) *Nelson v. Booth*, 1857, 3 DeG. & J. 119, at p. 122.

(*y*) *Gordon v. Eakins*, 1869, 16 Gr. 363, at p. 366.

(*z*) *Wilson v. Cluer*, 1840, 3 Beav. 136, at p. 140; *Coldwell v. Hall*, 1862, 9 Gr. 110, 7 U.C.L.J.O.S. 42, 8 U.C.L.J.O.S. 93; *Crippen v. Ogilvie*, 1869, 15 Gr. 568; *Ashworth v. Lord*, 1887, 36 Ch.D. 545. In *Wilson v. Cluer* it is suggested, however, that if after the mortgagee has been in possession there is a settled account by which it appears either that no interest remains overdue or that any interest which was due was satisfied as interest by being turned into principal, and the mortgagee continues in receipt of rents more than sufficient to satisfy the interest on the amalgamated principal and interest, the accounts must then be taken with rests.

incipal money, the interest is to be computed upon the principal money down to the time of payment, which payment is to be applied first in satisfaction of overdue interest, costs, charges and expenses, then in payment of overdue principal, and then in payment of the principal which has not yet fallen due, then a rest is made and from that time forth interest is to be charged upon the principal so reduced as aforesaid. The court may in its discretion direct the rest to be made immediately upon the receipt of the payment, or it may direct it to be made annually, semi-annually or otherwise. The former course might be adopted where the payments are few in number and large in amount, and the latter course where the payments are numerous but individually small in amount (a). More usually the account is directed to be taken with yearly or half-yearly rests (b).

The usual method of taking a mortgagee's account without rests is thus described by Jessel, M.R. (c):

"In taking the account you take all the mortgagee's receipts and place them on one side of the account: that is to say, you take all his receipts, whether they arise from the rents, or whether they arise from accidental payments, so to speak, such as fines or herlots; whatever the mortgagee has received from the mortgaged property is charged against him: Then, on the other side of the account you give him credit for his principal and all his interest. The result is that if the rents are more than the interest he keeps the rents without paying interest on the excess; if less, the mortgagor does not pay interest on the unpaid balance of interest. It is an accident in whose favour the account so taken may happen to be, but this is the mode of taking the account. Therefore it is not true to say that the rents are appropriated for the interest, for all the rents and receipts go in reduction of the principal and interest."

(a) *Birmingham v. Harwood*, 1825, Turn. & R. 477.

(b) Cf. 21 Halsbury, *Laws of England*, p. 220, note (a). As to the form of judgment directing accounts to be taken with rests, see *Cotham v. West*, 1839, 1 Beav. 380; *Ashworth v. Lord*, 1887, 36 Ch.D. 545, at p. 552. As to the mode of calculating interest where payments are made from time to time on account, see chapter 29, *Interest*, §315.

(c) *Union Bank of London v. Ingram*, 1880, 16 Ch.D. 53, at p. 56.

If a mortgagee in possession sells a part of the mortgaged property and the judgment directs an ordinary account, the ordinary course of practice is as follows: The account of what is owing to the mortgagee is treated as separate from the account of rents and profits. Money received from the exercise of the power of sale is credited to the mortgagor under the former account, but unless rests have been directed in the judgment the account of rents and profits goes on without rests, that is to say, the account of rents and profits runs on from beginning to end without reference to the question whether the mortgagee has at any particular time in his hands more than sufficient to pay the interest or not (*d*).

(*d*) *Ainsworth v. Wilding*, [1905] 1 Ch. 435, following *Wrigley v. Gill*, [1905] 1 Ch. 241, affirmed, [1906] 1 Ch. 165, and explaining *Thompson v. Hudson*, 1870, L.R. 10 Eq. 497.

CHAPTER XXIX.

INTEREST.

- §311. When interest is payable, p. 599.
- §312. Rate of interest until maturity, p. 600.
- §313. Rate of interest after maturity, p. 602.
- §314. Increased rate after default, p. 606.
- §315. Calculation and apportionment of interest, p. 608.
- §316. Compound interest, p. 611.
- §317. Interest in lieu of notice, p. 612.
- §318. Legislative jurisdiction as to interest and mortgages, p. 613.

§311. *When interest is payable.*

A mortgage usually provides for the payment of interest periodically on the principal, and the calculation of the interest payable is one of the items in the taking of the mortgage accounts (*a*). Sometimes, however, especially in the case of an equitable mortgage by deposit of title deeds, no express provision is made for payment of interest. In that event, in the absence of evidence of a contrary intention (*b*), there is an implied contract to pay interest from the time of the making of the advance secured by the mortgage (*c*). It frequently happens that there is no express provision for payment of interest after default. In that event interest will

(*a*) See chapter 27, *Accounting between Mortgagor and Mortgagee*, §293.

(*b*) E.g., if the instrument expressly provides for reconveyance or defeasance on repayment of the principal. *Thompson v. Drew*, 1855, 20 Beav. 49.

(*c*) In *re Kerr's Policy*, 1869, L.R. 8 Eq. 331; cf. *In re Drax, Savile v. Drax*, [1903] 1 Ch. 781, and cases cited in argument; 21 Halsbury, *Laws of England*, pp. 114, 115; but note that many of

nevertheless be payable on the overdue principal (*d*) even though the mortgage provides that no interest shall be payable until maturity or is expressed to be payable "without interest" (*e*). Interest after default is allowed by way of damages for the non-payment of the principal (*f*).

Even though an action on the covenant for payment or an action for foreclosure or sale is not barred by lapse of time, the right to recover arrears of interest out of the land is limited to six years (*g*).

§312. *Rate of interest until maturity.*

It is provided by the Interest Act, R.S.C. 1906, c. 120, s. 2, as follows:

2. Except as otherwise provided by this or by any other Act of the Parliament of Canada, any person may stipulate for, allow and exact, on any contract or agreement whatsoever, any rate of interest or discount which is agreed upon.

In the case of a mortgage the right conferred by this section is subject to ss. 6 to 9 of the Interest Act (*h*) and to the Money-Lenders Act (*i*). The Bank Act provides that no

the dicta relating to an implied contract to pay interest refer to interest from the time when the principal is payable, not to interest in the interval between the making of the mortgage and the time fixed for payment.

(*d*) But not on interest which is overdue. *Daniell v. Sinclair*, 1881, 6 App. Cas. 181, 18 R. C. 144.

(*e*) *McDonnell v. West*, 1868, 14 Gr. 492; *Reid v. Wilson*, 1881, 9 O.P.R. 166.

(*f*) *Re Phillips v. Hanna*, 1902, 3 O.L.R. 558; cf. cases cited in §313, as to rate of interest after default.

(*g*) See chapter 26, *Limitation of Actions*, §266.

(*h*) Ss. 6, 7 and 9 are quoted below. S. 8 is discussed in §314. They apply only to mortgages executed after the 1st day of July, 1880: R. S. C. 1906, c. 120, s. 11.

(*i*) R. S. C. 1906, c. 122, a statute applicable only to loans of not more than \$500 made by persons who carry on the business of money lending and who make a practice of lending money at a higher rate of interest than 10%. See also the Ontario Money Lenders Act, R.S.O. 1914, c. 175.

higher rate of interest than 7 per cent. shall be recoverable by a bank (j).

Ss. 6, 7 and 9 of the Interest Act above referred to are as follows:

6. Whenever any principal money or interest secured by mortgage of real estate is, by the same, made payable on the sinking fund plan, or on any plan under which the payments of principal money and interest are blended, or on any plan which involves an allowance of interest on stipulated repayments, no interest whatever shall be chargeable, payable or recoverable, on any part of the principal money advanced, unless the mortgage contains a statement showing the amount of such principal money and the rate of interest chargeable thereon, calculated yearly or half-yearly, not in advance.

7. Whenever the rate of interest shown in such statement is less than the rate of interest which would be chargeable by virtue of any other provision, calculation or stipulation in the mortgage, no greater rate of interest shall be chargeable, payable or recoverable, on the principal money advanced, than the rate shown in such statement.

9. If any sum is paid on account of any interest fine or penalty not chargeable, payable or recoverable under the three (k) sections last preceding, such sum may be recovered back or deducted from any other interest, fine or penalty chargeable, payable or recoverable on the principal.

It is not necessary under s. 6 that the mortgage shall contain a statement showing how much of each blended payment is principal and how much is interest or showing the actuarial calculation by which the amount of each payment is fixed, and it is sufficient if the mortgage contains a covenant to pay a specified sum for principal and a specified rate of interest (l), or a statement specifying the amount of the principal and the rate of interest (m).

(j) 3 & 4, G. 5, c. 9, s. 91.

(k) As to s. 8, see §314, *infra*.

(l) Canadian Mortgage Investment Co. v. Cameron, 1917, 55 Can. S.C.R. 409, 38 D.L.R. 428, reversing 11 A.L.R. 441, 33 D.I.R. 792.

(m) Standard Reliance Mortgage Corporation v. Stubbs, 1917, 55 Can. S.C.R. 422, 38 D.L.R. 435, reversing 27 M.R. 276, 32 D.L.R. 57.

It is provided by the Interest Act, s. 3, as follows:

3. Except as to liabilities existing immediately before the seventh day of July, one thousand nine hundred, whenever any interest is payable by the agreement of parties or by law, and no rate is fixed by such agreement or by law, the rate of interest shall be five per centum per annum.

Prior to the 7th of July, 1900, the rate of interest prescribed in the case mentioned in this section was 6% (n). The exception refers to liabilities for interest not to liabilities for principal, so that if a mortgage was made prior to the 7th of July, 1900, and does not contain any express provision as to the rate of interest after default, the rate payable after default will be only 5% in respect of the period subsequent to the 7th of July, 1900 (o).

§313. *Rate of interest after maturity.*

Subject as already stated (p) a mortgagee may stipulate for the payment after default of any rate of interest whatsoever not exceeding the rate of interest payable before default (q), but in order to provide effectually for the payment of interest at a stated rate after default, the parties must use language showing clearly and unambiguously that they intend such rate to apply not only *ad diem* but also *post diem*, and in the absence of unequivocal language there is no presumption that the parties intended to provide for a breach of the contract (r).

A stipulation that interest at a stated rate shall be payable "whether before or after default," "as well after as be-

(n) R.S.C. 1886, c. 127, s. 2.

(o) Plenderleith v. Parsons, 1907, 14 O.L.R. 619; British Canadian Loan and Agency Co. v. Farmer, 1904, 15 M.R. 593; Kerr v. Colquhoun, 1911, 2 O.W.N. 521.

(p) See §312, *supra*.

(q) As to a stipulation for a higher rate after default, see §314, *infra*.

(r) St. John v. Rykert, 1884 10 Can. S.C.R. 278; Cook v. Fowler, 1874, L.R. 7 H.L. 27, at p. 37, 14 R.C. 546, at p. 555.

fore maturity" or otherwise unequivocally expressed (*s*) will be effectual to provide for payment at the contract rate after default, but a stipulation that interest shall be payable at a stated rate upon the principal money "until paid," "until payment in full" or "until such principal money and interest shall be fully paid and satisfied" will be construed as providing merely for payment at the contract rate until the day fixed for payment of the principal (*t*). The words "so long as the sum of £3000 or any part thereof should remain due on the security of the said indenture" were held to be susceptible of the construction that interest was to be paid at the contract rate after as well as before default (*u*). On the other hand, in the case of a mortgage containing a stipulation that "on default of payment of any of the instalments hereby secured . . . interest at the rate above mentioned shall be paid on all sums so in arrear" it was held that the whole principal sum, which became due by virtue of an acceleration clause, was not a sum "so in arrear" on which the mortgagee would be entitled to interest at the contract rate after the day named in the mortgage for the payment (*v*).

Where a mortgagor continued to pay interest after default at the rate stipulated for during the currency of the mortgage, and it appeared that both the mortgagor and the mortgagee were ignorant of the law on the subject and believed that interest at the mortgage rate was payable after default, it was held that the excess could not be recovered back as money paid

(*s*) *Muttlebury v. Stevens*, 1886, 13 O.R. 29, at p. 31; *Imperial Trusts Co. v. New York Security and Trust Co.*, 1905, 10 O.L.R. 289; *Pringle v. Hutson*, 1909, 19 O.L.R. 652; *Credit Foncier Franco-Canadien v. Schultz*, 1893, 9 M.R. 70.

(*t*) *St. John v. Rykert*, *supra*; *Powell v. Peck*, 1888, 15 O.A.R. 138; *People's Loan and Deposit Co. v. Grant*, 1890, 18 Can. S.C.R. 262; *Freehold Loan Co. v. McLean*, 1891, 8 M.R. 116.

(*u*) *Popple v. Sylvester*, 1882, 22 Ch.D. 98.

(*v*) *Biggs v. Freehold Loan and Savings Co.*, 1901, 31 Can. S.C.R. 136, reversing 26 O.A.R. 232.

under mistake, and that the mortgagor could not require it to be applied in reduction of the principal (*w*). The fact that interest has been paid after default at the mortgage rate does not however give rise to any implied contract to continue to pay at that rate (*x*).

In the absence of an unequivocal stipulation for payment of interest after default at the contract rate the mortgagee will be entitled after default to interest by way of damages at 5% in respect of the period since the 7th of July, 1900 (*y*), and if default occurred before the date, 6% in respect of the period intervening between default and that date (*z*). Some of the earlier decisions in Ontario were in favour of the view that the rate of interest to be allowed by way of damages depended upon the ordinary value of money during the period of default (*a*) and that the rate stipulated for before default might be taken into consideration or might be allowed as being a reasonable rate after default (*b*). It now appears to be settled, however, that if the mortgagee does not stipulate expressly for a particular rate by way of damages after default, the rate allowed will be the rate mentioned in the Interest Act (*c*).

(*w*) *Stewart v. Ferguson*, 1899, 31 O.R. 112; *McKenzie v. McLeod*, 1909, 39 N.B.R. 230; but see *Daniell v. Sinclair*, 1881, 6 App. Cas. 181, 18 R.C. 144, and *Kerr v. Colquhoun*, 1911, 2 O.W.N. 521; *In re Jones's Estate*, [1914] 1 I.R. 188.

(*x*) *Cook v. Fowler*, 1874, L.R. 7 H.L. 27, 14 R.C. 546; *In re Roberts*, 1880, 14 Ch.D. 49.

(*y*) See the Interest Act, s. 3, *supra*, §312.

(*z*) See R.S.C. 1886, c. 127, s. 2, *supra*, §312.

(*a*) *Archbold v. Building and Loan Association*, 1888, 15 O.R. 237, S.C. 16 O.A.R. 1.

(*b*) *Simonton v. Graham*, 1881, 8 O.P.R. 495; *McDonald v. Elliott*, 1886, 12 O.R. 98; *Muttlebury v. Stevens*, 1886, 13 O.R. 29; *Powell v. Peck*, 1888, 15 O.A.R. 138. Cf. *Cook v. Fowler*, 1874, L.R. 7 H.L. 27, 14 R.C. 546; *In re Roberts*, 1880, 14 Ch. D. 49; *Mellersh v. Brown*, 1890, 45 Ch.D. 225.

(*c*) *People's Loan and Deposit Co. v. Grant*, 1890, 18 Can. S.C.R. 262; *Freehold Loan Co. v. McLean*, 1891, 8 M.R. 116; *Manitoba and Northwest Loan Co. v. Barker*, 1892, 8 M.R. 296; *Cunningham v.*

As regards the rate to be allowed for damages after default there is no distinction between actions for foreclosure and redemption and actions on the covenant (*d*).

A judgment on the covenant for payment carries interest from its date at 5% per annum (*e*). The mortgage debt is merged in the judgment. If the covenant to pay interest is merely incidental to the covenant to pay the principal, as, for instance, if the covenant is to pay interest on principal remaining unpaid, the interest will no longer be paid at the contract rate under the covenant to pay interest but at the statutory rate under the judgment (*f*). If, however, the covenant is to pay interest on the principal money remaining due on the security of the mortgage, the covenant remains operative notwithstanding the judgment (*g*) and if it provides for payment at the named rate after maturity, that rate will be payable.

A judgment on the covenant for payment causes a merger only of the personal claim against the covenantor, and does not affect the right to claim interest at the contract rate in a proceeding with regard to the mortgage (*h*) or any collateral security held by the mortgagee (*i*).

Hamilton, 1897, 5 B.C.R. 539; Hanford v. Howard, 1896, 1 N.1. Eq. 241.

(*d*) Powell v. Peck, *supra*; Cook v. Fowler, *supra*; People's Loan and Deposit Co. v. Grant, *supra*.

(*e*) The Judicature Act, R.S.O. 1914, c. 56, s. 35; the Interest Act, R.S.C. 1906, c. 120, s. 3.

(*f*) Ex parte Fewings, In re Sneyd, 1883, 25 Ch.D. 338, at p. 353.

(*g*) Popple v. Sylvester, 1882, 22 Ch.D. 98, as explained in Economic Life Assurance Society v. Osborne, [1902] A.C. 147, at p. 152. As to this fine distinction drawn in the English cases, see further 21 Halsbury, Laws of England, p. 226, note (f); Lowry v. Williams, [1895] 1 I.R. 274.

(*h*) Economic Life Assurance Society v. Osborne, *supra*; Lowry v. Williams, *supra*.

(*i*) Wegg Prosser v. Evans, [1894] 2 Q.B. 101, [1895] 1 Q.B. 108.

In Ontario where a charge on land is created under the Land Titles Act there is an implied covenant that if the principal sum or any part thereof shall remain unpaid at the appointed time interest shall be paid half-yearly at the appointed rate on so much of the principal sum as for the time being shall remain unpaid (*j*).

§314. *Increased rate after default.*

A stipulation in a mortgage that the rate of interest shall be increased if interest at the normal rate is not punctually paid is regarded as a penalty against which equity will grant relief, but a stipulation for interest at a given rate with a provision that a lower rate than the rate reserved will be accepted if paid punctually is good, and the higher rate is recoverable after default (*k*).

In Ontario in the case of mortgages made prior to the first day of July, 1880, a stipulation for an increased rate of interest after default in payment of principal, has been held to be enforceable. Thus, where a mortgage stipulated that up to a certain day the interest should be eight per centum, and that if the principal were not then paid twelve per centum should be charged thereafter, it was held that the stipulation for payment of twelve per centum was not by way of penalty, but an agreement to pay that rate from the day named (*l*). Where a mortgage to secure the repayment of money with interest at ten per centum provided that should default be made in payment of the principal money or interest, or any part

(*j*) R.S.O. 1914, c. 126, s. 31.

(*k*) *Nicholls v. Maynard*, 1747, 3 Atk. 519, 18 R.C. 141; *Wallingford v. Mutual Society*, 1880, 5 App. Cas. 685, at p. 702; *Union Bank of London v. Ingram*, 1880, 16 Ch.D. 53; *Cockburn v. Edwards*, 1881, 18 Ch.D. 449; *In re Moss*, *Levy v. Sewell*, 1885, 31 Ch.D. 90; *Bright v. Campbell*, 1889, 41 Ch.D. 388; *Salt v. Marquess of Northampton*, [1892] A.C. 1, at p. 19. See also an article by A. C. Meredith in 32 L.Q.R. 420 (October, 1916).

(*l*) *Waddell v. McColl*, 1868, 14 Gr. 211.

thereof respectively, then the amount so overdue and unpaid should bear interest at the rate of twenty per cent. per annum until paid, it was held that the proviso was not invalid or to be relieved against (*m*).

In the case of mortgages created after the 1st day of July, 1880, it is now provided by the Interest Act, R.S.C. 1906, c. 120, s. 8, as follows:

8. No fine or penalty or rate of interest shall be stipulated for, taken, reserved or exacted on any arrears of principal or interest secured by mortgage of real estate, which has the effect of increasing the charge on any such arrears beyond the rate of interest payable on principal money not in arrear; provided that nothing in this section contained shall have the effect of prohibiting a contract for the payment of interest on arrears of interest or principal at any rate not greater than the rate payable on principal money not in arrear (*n*).

It is also provided in Ontario by the Mortgages Act, R.S.O. 1914, c. 112, s. 18, as follows (*o*):

18.—(1) Where in a mortgage falling due after the 20th day of April, 1907, provision is made that if interest is paid promptly it will be accepted at a lower rate than that provided in such mortgage, and interest at such lower rate has been paid according to such condition up to the time when all the principal money has become payable, any person liable to pay or entitled to redeem shall be entitled to pay the principal money and interest on the same at such lower rate at any time after the time for payment of the principal money on giving three months' notice of his intention to make such payment or on paying three months' interest at such lower rate in lieu of notice.

(2) If the mortgagor, or person entitled to make such payment, fails to make the same at the time mentioned in such notice, he shall thereafter be entitled to make such payment only on paying the principal and interest at the lower rate to the date of payment, together with three months' interest in advance.

(*m*) Downey v. Parnell, 1882, 2 O.R. 82.

(*n*) As to recovery back of excess interest paid, see s. 9 of the same statute, quoted *supra* in §312.

(*o*) As to the power of a provincial legislature to legislate on this subject, see §318, *infra*.

A new bargain may, however, be made that an increased rate of interest shall be payable in consideration of forbearance or the like (*p*). A bargain for extra interest made between a derivative mortgagee and the original mortgagor inures to the benefit of the original mortgagee (*q*). In one case a written promise by a mortgagor made after default to allow more than 6%, the rate reserved by the mortgage, was held binding, although there did not appear by the writing to have been any consideration of forbearance or otherwise for the promise (*r*). But a parol agreement to add 2% to the rate of interest reserved by a mortgage in consideration of an extension of the time for payment was held to be insufficient to charge the extra interest upon the land as against a subsequent purchaser of the equity of redemption (*s*). A parol agreement to pay a higher rate of interest than that reserved in the mortgage is ineffectual to charge the lands as against a devisee or heir of the mortgagor (*t*).

§315. *Calculation and apportionment of interest.*

Interest on a mortgage though payable at fixed times is deemed to accrue from day to day (*u*), and as between persons entitled in succession to the interest it will be apportioned (*v*).

Where interest is payable periodically it is chargeable on the whole outstanding principal unless otherwise expressly provided, and where a mortgage contained a covenant to pay

(*p*) *Brown v. Barkham*, 1720, 1 P. Wms. 652; *Law v. Glenn*, 1867, L.R. 2 Ch. 634; *Standard Trusts Co. v. Hurst*, 1914, 24 M.R. 185, 16 D.L.R. 473.

(*q*) *Grahame v. Anderson*, 1868, 15 Gr. 189.

(*r*) *Brown v. Deacon*, 1866, 12 Gr. 198.

(*s*) *Totten v. Watson*, 1870, 17 Gr. 233.

(*t*) *Re Houston, Houston v. Houston*, 1882, 2 O.R. 84; *Matson v. Swift*, 1841, 5 Jur. 645.

(*u*) *In re Rogers' Trusts*, 1860, 1 Dr. & S. 338.

(*v*) *Edwards v. Countess of Warwick*, 1723, 2 P. Wms. 171.

the principal sum in eight equal annual instalments, "with interest on the principal sum remaining due at each payment," it was held that the interest must be paid with each instalment on the whole principal money unpaid, and not on the instalment only (*w*).

A mortgagee is entitled to charge interest upon all sums which by agreement express or implied he is authorized to add to his security, such as moneys paid upon prior encumbrances or for improvements, insurance premiums or taxes (*x*).

Interest begins to run only from the time the money is actually advanced and not necessarily from the date of the mortgage (*y*).

Where the interest is payable in advance the mortgagee is nevertheless not entitled to have interest allowed for a period subsequent to that appointed for redemption. Thus interest on a mortgage was payable half-yearly in advance on the 1st of April and October; the mortgagee filed a bill for sale, and the registrar on taking the account (in the latter part of January) fixed a day in July following for payment, and allowed the plaintiff interest to that date, but refused to allow him the half year's interest payable in advance on the 1st of April (*z*). Where an action is brought to foreclose a mortgage payable by instalments, and the defendant moves to stay the action, on payment of the instalment and interest then due, the interest upon the mortgage money is to be computed only to the last preceding gale day and not to the time of the making of the application (*a*).

(*w*) *Hall v. Brown*, 1858, 15 U.C.R. 419.

(*x*) *Quarrell v. Beckford*, 1816, 1 Madd. 269; *McMaster v. Hector*, 1872, 8 C.L.J. 284.

(*y*) *Edmonds v. Hamilton Provident and Loan Soc.*, 1890, 19 O.R. 677; 18 O.A.R. 347.

(*z*) *Trust and Loan Co. v. Kirk*, 1880, 8 O.P.R. 203.

(*a*) *Strachan v. Murney*, 1858, 6 Gr. 378; see chapter 24. *Action for Foreclosure or Sale*, §242.

Where purchase money out of which mortgage moneys are payable is directed to be paid into court on a certain day, but is not actually paid in till long after, the mortgagee is entitled to interest at the rate reserved in his mortgage until he receives notice of payment into court (*b*). Where the mortgagee, because he has mislaid the mortgage deed, or for some other reason, is unable to give a discharge at the time when the mortgage moneys are paid or tendered he will not be allowed subsequent interest (*c*).

A mortgagee is not ordinarily obliged to accept payment "by dribblets" (*d*), but if payments are in fact made from time to time on account of the mortgage, the question arises as to the manner in which the payments should be applied. If a debtor who makes payments from time to time to a creditor does not stipulate for a particular mode of application, the creditor may appropriate the payments in the first place to the keeping down of the interest. The proper mode is to calculate the interest upon the debt to the time of each payment, then to apply the amount paid in discharge of that interest in the first place, and the surplus, if any, in discharge of so much of the principal in the second place, and to proceed in like manner through the account, calculating the interest on the unpaid balance of principal in respect of the period between two payments. The mode sometimes adopted, namely, to calculate interest upon the whole debt for the whole period, as if no payments had been made, on the one side, and to calculate interest on the amount of each payment from the time it was made, on the other side, and then to deduct the

(*b*) *McDermid v. McDermid*, 1870, 7 O.P.R. 457.

(*c*) *Lord Middleton v. Elliot*, 1847, 15 Sim. 531; *James v. Rumsey*, 1879, 11 Ch.D. 398.

(*d*) But in some circumstances a mortgagee who takes possession may be obliged, in effect, to accept payment in this way, by applying rents and profits received upon the mortgage debt. See chapter 28, *Mortgagee in Possession*, §308.

total of the payments and interest from the whole debt and interest, is unjust to the creditor, because the effect is to allow interest to the debtor upon payments made on account of interest although no corresponding allowance of interest upon interest is made to the creditor (*e*).

§316. *Compound interest.*

Formerly a stipulation for capitalising interest in arrear, turning it into principal and charging interest upon it, however formally expressed, was not allowed to prevail in equity (*f*), but a stipulation for compound interest is now recognized as valid (*g*). Such a stipulation will, however, be strictly construed. In the absence of an agreement, express or implied, for compound interest the mortgagee is entitled only to simple interest (*h*). Where by the terms of the mortgage interest is payable on interest in arrear, but there is no express stipulation that interest on interest shall be paid after the maturity of the principal, it has been held that interest on interest after maturity is not recoverable (*i*).

A mortgage of leaseholds contained a proviso that if and so often as any interest due under the mortgagor's covenant should be in arrear for twenty-one days after the day ap-

(*e*) *McGregor v. Gaulin*, 1848, 4 U.C.R. 378; *Bettes v. Farewell*, 1865, 15 U.C.C.P. 450; *Patterson v. Dart*, 1911, 24 O.L.R. 609.

(*f*) *Mainland v. Upjohn*, 1889, 41 Ch.D. 126, at pp. 136 ff.; *James v. Kerr*, 1889, 40 Ch.D. 449, at pp. 459, 460.

(*g*) *Clarkson v. Henderson*, 1880, 14 Ch.D. 348; *Salt v. Marquess of Northampton*, [1892] A.C. 1.

(*h*) *Daniell v. Sinclair*, 1881, 6 App. Cas. 181, 18 R.C. 144; *McLaren v. Miller*, 1874, 20 Gr. 637; *Thomson v. O'Toole*, 1888, 21 N.S.R. 1; *Richardson v. Jackson*, 1897, 34 N.B.R. 301.

(*i*) *Wilson v. Campbell*, 1879, 8 O.P.R. 154; *Manitoba and Northwest Loan Co. v. Barker*, 1892, 8 M.R. 296; *Imperial Trusts Co. v. New York Security and Trust Co.*, 1905, 10 O.L.R. 289. Cf. *King v. Keith*, 1898, 1 N.B. Eq. 538, and *Pringle v. Hutson*, 1909, 19 O.L.R. 652, in which effect was given to stipulations for interest on interest after maturity of the principal.

pointed for the payment thereof interest should be treated as an accession to the capital as on the day on which the same ought to have been paid, and should thenceforth bear interest at the rate and on the days provided by the mortgage. The mortgagee entered into possession of the property and received the rents. On the taking of the accounts in a redemption action, it was held that if on the expiration of twenty-one days after any interest became due, the mortgagor not having paid the interest, there was in the hands of the mortgagee, after deducting ground rent and other proper outgoings, an amount arising from the rents received by him sufficient for the payment of the interest, though it had not been actually appropriated to that purpose, the interest could not be said to be in arrear within the meaning of the proviso, and the mortgagee was therefore not entitled to have it capitalized (*j*).

An assignee of a mortgage is not entitled without the mortgagor's concurrence to interest on interest in arrear paid by him on taking over the mortgage (*k*), and in a suit to redeem a mortgage against an assignee who at the mortgagor's request paid off both principal and interest due at the time of the assignment, it was held that the assignee was not entitled to interest on the sum paid for interest (*l*).

Where a subsequent encumbrancer pays off a prior encumbrance he is entitled to interest on the aggregate amount paid by him for principal, interest and costs; interest on the principal being allowed at the rate reserved in his own security, but on the interest and costs at the statutory rate only (*m*).

§317. *Interest in lieu of notice.*

The Interest Act, R.S.C. 1906, c. 120, also contains a provision (s. 10) that whenever any principal money or interest

(*j*) *Wrigley v. GHI*, [1906] 1 Ch. 165.

(*k*) See chapter 11, *Assignee of the Mortgage*, §104.

(*l*) *Thomas v. Girvan*, 1897, 1 N.B. Eq. 257.

(*m*) See chapter 24, *Action for Foreclosure or Sale*, §241.

secured by a mortgage of real estate is not, under the terms of the mortgage, payable till a time more than five years after the date of the mortgage, any person liable to pay or entitled to redeem may thereafter tender or pay to the person entitled to receive the money the amount due for principal or interest to the time of payment, together with three months' further interest in lieu of notice, and in that event no further interest shall be chargeable, payable or recoverable at any time thereafter on the principal money or interest due under the mortgage (n).

Apart from statute, and as a general rule, where it may be inferred from the transaction that the loan is intended to be of a permanent character, a mortgagor must, after default in payment on the day, give to the mortgagee six months' notice of his intention to pay off the mortgage or pay six months' interest in lieu of notice. This rule has, however, been modified by statute in Ontario (o).

§318. *Legislative jurisdiction as to interest and mortgages.*

By s. 91 of the British North America Act, 1867, exclusive legislative authority with regard to "Interest" is conferred upon the dominion parliament, and by s. 92 of the same statute, in each province the legislature may exclusively make laws in relation to "Property and Civil Rights in the Province."

The subject of mortgages, generally speaking, falls within "property and civil rights in the province," and for our present purpose difficulty arises only where the subjects of interest and mortgages impinge on each other. The natural division

(n) As this provision and the corresponding Ontario statute relate to the right to redeem, they are discussed in chapter 25, *Action for Redemption*, §252. As to the question of legislative authority, see §318, *infra*.

(o) As the subject relates to the terms of redemption after default, it is discussed in chapter 25, *Action for Redemption*, §253.

between the legislative authority of the Dominion and that of the provinces would appear to be (1) to assign to the Dominion the right to legislate with regard to usury and the rate of interest generally, including the right to require that the rate of interest shall be stated clearly in a mortgage securing the repayment of a loan with interest and, at least in the absence of express provincial legislation, the right to prescribe the rate of interest payable in cases where the rate is not specified in a mortgage, and (2) to assign to the provinces the right to legislate as to the time and terms of redemption of a mortgage, including the right to provide upon what terms a mortgage shall be redeemable after a given period or after maturity, even though the terms prescribed involve the payment of interest in lieu of notice.

All the provisions of the Interest Act appear to fall clearly within the legislative authority of the Dominion, with the exception of s. 10, which provides in effect that no mortgage shall be made irredeemable for a longer term than five years if after five years the mortgagor tenders or pays three months' interest in addition to the principal and interest to the time of tender or payment (*p*). The question whether this section is within the legislative authority of the Dominion is to a large extent academic in Ontario because in that province there is a similar provincial statute (*q*), but the question may be important in some of the other provinces. In Ontario prior to the enactment of the provincial statute the validity of s. 10 of the Interest Act was upheld (*r*), but it is doubtful whether the decision can be justified on principle.

(*p*) The text of the section is quoted in chapter 25, *Action for Redemption*, §252.

(*q*) The Mortgages Act, R.S.O. 1914, c. 112, s. 17.

(*r*) *Bradburn v. Edinburgh Assurance Co.*, 1903, 5 O.L.R. 657. In the case of *In re Parker, Parker v. Parker*, 1894, 24 O.R. 373, the section was applied and its validity appears to have been taken for granted.

It would seem that the minister of justice himself questioned the validity of the statute on the ground that it related "not to interest, properly speaking, but rather to contracts for the securing of money—clearly a matter of provincial jurisdiction" (s).

Britton, J., holding that s. 10 was *intra vires*, said (t):

"In so holding I do not overlook the argument that, as a logical result, the Dominion can legislate to limit any contract to the shortest duration where the interest is involved, nor do I overlook the decision in *The Citizens Insurance Co. of Canada v. Parsons* (u) that 'property and civil rights' in section 92 of the British North America Act, include rights arising from contract, . . . and are not limited to such rights only as flow from the law. It is however, one thing to legislate where the contract has sole reference to security for money lent at interest, and quite a different thing to legislate in reference to other contracts where interest is only an incident."

In the passage quoted the learned judge has referred to two considerations which render it highly probable that the section ought to be held to be *ultra vires*. It is submitted that a statute providing that interest shall cease to be chargeable under a mortgage after a certain period upon the mortgagor making tender or payment in accordance with the statute has as its primary object the shortening of the duration of the

(s) House of Commons Debates, 1886, p. 440. The paragraph in the text is in substance quoted from Lefroy, *Canada's Federal System*, p. 277. The learned author, after referring to some decisions not specifically relating to s. 10, adds at pp. 278, 279: "It may be that the Dominion power as to 'interest' will be ultimately found to be confined to fixing what shall be the legal rate of interest apart from express agreement or express provincial enactment, and the passing of usury laws, restricting the charging of interest throughout the Dominion or any part thereof."

(t) 5 O.L.R. 657, at p. 656.

(u) 1881, 7 App. Cas. 96.

contract, that is, it relates to the time and terms of redemption, and this is so notwithstanding that interest is incidentally involved in the fact that the shortening of the duration of the contract is enforced by the depriving of the mortgagee of the right to subsequent interest. Further, it is submitted that in view of the fact that interest is not an essential feature of a mortgage, the contract of mortgage is not properly distinguishable from all other contracts as being one which "has sole reference to the security for money lent at interest." Indeed, if such a distinction were valid, it would seem to follow that the Dominion would have the right to legislate with regard to the subject of mortgages generally.

In Ontario the Mortgages Act, R.S.O. 1914, c. 112, contains several sections involving the question of interest. In accordance with the division between the legislative authority of the Dominion and that of the provinces suggested above as the proper one, these sections all appear to be *intra vires* except perhaps s. 18.

The subject matter of the last mentioned section would seem to be the rate of interest chargeable after default rather than the terms of redemption of a mortgage (*r*), whereas the subject matter of ss. 15, 16 and 17 (*w*) is the terms or the time of redemption, not the rate of interest.

(*r*) The text is quoted in §314, *supra*.

(*w*) As to ss. 15 and 16, see chapter 25, *Action for Redemption*, "§253; as to s. 17, see §252.

CHAPTER XXX.

COSTS.

- §321. General principles, p. 617.
- §322. Costs of negotiating and completing loan, p. 618.
- §323. Costs incurred to protect the security, p. 619.
- §324. Costs of mortgage action, p. 622.
- §325. Taxation of costs, p. 628.

§321. *General principles.*

In England, the mortgagee on the usual order for foreclosure, as on the usual order for redemption, is entitled only to the taxed costs of the action, but on a special case being made a direction will be made for an enquiry as to the "costs, charges and expenses properly incurred by him in respect of his mortgage security" (a). In Ontario it is provided by rule 410 that under an order of reference the master may take into account "costs and other expenses properly incurred" (b). The court will proceed on the principle stated in *Dryden v. Frost* (c) :

"This Court, in settling the account between a mortgagor and mortgagee, will give to the latter all that his contract, or the legal or equitable consequences of it, entitle him to receive, and all the costs properly incurred in ascertaining or defending such rights, whether at law or in equity. But even as to the costs in equity this Court exercises a discretion, and refuses to him his costs if his conduct has been improper; and, in some cases, orders him to pay them. In *Detillin v. Gale* (d) Lord Eldon says that he ought to be indemnified to the extent that he acts reasonably as mortgagee;

(a) *Rees v. Metropolitan Board of Works*, 1880, 14 Ch.D. 372.

(b) See chapter 27, *Accounting between Mortgagor and Mortgagee*, §293.

(c) 1838, 3 My. & Cr. 670, at p. 675; *Wales v. Carr*, [1902] 1 Ch. 860, at p. 863; *National Provincial Bank of England v. Games*, 1886, 31 Ch.D. 582, at p. 592.

(d) 1802, 7 Ves. 583, 18 R.C. 502.

which must mean *reasonably* with respect to such rights as his mortgage title gives him."

The indemnification of the mortgagee extends so far as he acts reasonably as a mortgagee, and the court will indemnify him to this extent, whether he could have recovered the consequent costs, charges, or expenses at law or not (*e*).

§322. *Costs of negotiating and completing loan.*

As the mortgagee is entitled, in the taking of the mortgage account, to be indemnified only so far as he has acted reasonably as mortgagee, he is not entitled, in the absence of special agreement, to add to the price of redemption the costs of negotiating the loan, investigating the title and completing the security (*f*). These costs, though they constitute a common law debt of the mortgagor to the mortgagee, which can be recovered by the latter as soon as the mortgage is made (*g*), are not costs incurred by the mortgagee as mortgagee (*h*). If the mortgage transaction falls through, the proposed lender has no claim against the borrower, in the absence of a special agreement, for the costs of negotiating the loan and investigating the title (*i*).

(*e*) *Ex parte Fewings*, *In re Sneyd*, 1883, 25 Ch.D. 338, at p. 348; *Strahan*, *Law of Mortgages*, 2nd ed., pp. 168-169.

(*f*) *Wales v. Carr*, [1902] 1 Ch. 860; cf. *Gregg v. Slater*, 1856, 22 Beav. 314.

(*g*) Therefore, in accordance with the usual practice, they may be deducted from the amount of the advance. *Wilkinson v. Grant*, 1856, 18 C.B. 319, at p. 320; cf. *Ex parte Challinor*, *In re Rogers*, 1880, 16 Ch.D. 260, at p. 266; *Ex parte Rolph*, *In re Spindler*, 1881, 19 Ch.D. 98; *Hamilton v. Chaine*, 1881, 7 Q.B.D. 319.

(*h*) *Strahan*, *Law of Mortgages*, 2nd ed., pp. 169, 170.

(*i*) *Melbourne v. Cottrell*, 1857, 29 L.T. 293; *Holborrow v. Lloyd*, 1859, 5 Jur. N.S. 114. An executory agreement to borrow money or to lend money will not be specifically enforced, the parties being left to their actions at law for damages. *Rogers v. Challis*, 1859, 27 Beav. 175, 18 R.C. 278; *Sickel v. Mosenthal*, 1862, 30 Beav. 371, 18 R.C. 282; *Larles v. Gurety*, 1874, L.R. 5 P.D. 246; *Western Wagon*

On the other hand, in an action to foreclose an equitable mortgage by deposit of title deeds with a memorandum whereby the mortgagor agreed to execute a legal mortgage, of all his estate and interest in the mortgaged lands, the mortgagees were allowed, in the mortgage accounts, the costs of preparing a legal mortgage, the costs of correspondence with the mortgagor as to the legal mortgage, the costs of correspondence with a surety who had given a promissory note for part of the mortgage debt, but the mortgagees were not allowed the costs of investigating the title, for the mortgagor had only agreed to execute a legal mortgage of his estate and interest (*j*).

§323. *Costs incurred to protect the security.*

The mortgagee is entitled to add to his mortgage debt all costs reasonably incurred by him to preserve the mortgaged property or protect the security, and to assert a charge for such costs in priority to all persons claiming under the mortgagor, including subsequent encumbrancers (*k*). The mortgagee's right to add such costs to his mortgage arises out of the mortgage contract, but it is not founded on an implied contract by the mortgagor to pay them, and while they form part of the price of redemption, they do not constitute a debt of the mortgagor for the recovery of which an action may be brought (*l*).

Equity, acting on the maxim that *he who seeks equity must do equity*, requires the mortgagor seeking to redeem, whether in an action for foreclosure or sale or in an action for redemp-

Co. v. West, [1892] 1 Ch. 271; Calvert v. Burnham, 1881, 6 O.A.R. 620; Mennie v. Leitch, 1885, 8 O.R. 397.

(*j*) National Provincial Bank of England v. Games, 1886, 31 Ch.D. 582.

(*k*) Dryden v. Frost, 1838, 3 My. & Cr. 670; Barnes v. Racster, 1842, 1 Y. & C.C.C. 401; National Provincial Bank of England v. Games, 1886, 31 Ch.D. 582.

(*l*) Ex parte Fewings, In re Sneyd, 1883, 25 Ch.D. 338.

tion, to pay not only the principal and interest but also the costs properly incurred by the mortgagee in relation to his mortgage security.

"The owner coming to deliver the estate from that incumbrance he himself put upon it, the person having that pledge is not to be put to expense with regard to that; and so long as he acts reasonably as mortgagee, to that extent he ought to be indemnified." (*m*).

Generally speaking, a mortgagee will not be entitled to add to his mortgage debt the costs of unsuccessful proceedings at law instituted by him without the approval of the mortgagor (*n*). The test of his right to add to his mortgage debt the costs of litigation with respect to the mortgage security is not the success or failure of the litigation but the reasonableness of his conduct, and he may in the particular circumstances be entitled to the costs of unsuccessful litigation (*o*).

The rule in the case of a trustee is that he is entitled to indemnity out of the trust estate for costs incurred by him in unsuccessful litigation if he acted under the advice of the court or if the circumstances were such that the court, if applied to, would have advised the prosecution or defence of the litigation (*p*). By analogy the mortgagee should be entitled to indemnity if the circumstances were such that, had he been a trustee and therefore entitled to apply to the court for advice, the court would have advised him to act as he did.

The mortgagee is entitled to the costs of sale proceedings, taken reasonably, which prove abortive. Such costs were al-

(*m*) *DeHillin v. Gale*, 1802, 7 Ves. 583, at pp. 584-5, 18 R.C. 502, at p. 503.

(*n*) *Wells v. Trust and Loan Co. of Canada*, 1884, 9 O.R. 170; cf. *Peers v. Cecley*, 1852, 15 Beav. 209; *Burke v. O'Connor*, 1853, 4 Ir. Ch. 418.

(*o*) *Ellison v. Wright*, 1827, 3 Russ. 458; *National Provincial Bank of England v. Games*, 1886, 31 Ch.D. 582, at p. 593; *Ex parte Carr*, *In re Hofman*, 1879, 11 Ch. D. 62.

(*p*) *In re Beddoe, Downes v. Cottam*, [1893] 1 Ch. 547, at pp. 557-562; *Smith v. Beal*, 1891, 25 O.R. 368.

lowed in a case in which the sale was abortive by reason of the subsequent dishonour of a cheque which the auctioneer accepted as a deposit from a bidder (*q*).

A mortgagee is entitled to add to his mortgage debt the costs of administration procured by him of the personal estate of the mortgagor where the court deems such a course to be reasonably taken for his protection (*r*), or the costs of procuring administration of the estate of an encumbrancer where that is necessary in order to the carrying on of a foreclosure action (*s*).

If a mortgagee has been put to expense in defending the title to the mortgaged estate, the defence being for the benefit of all persons interested in the estate, he is entitled to add the costs to his mortgage debt (*t*), but it has been held that he is not entitled to add his costs of defending an action in which his title as mortgagee only is disputed (*u*) or the costs of litigation wrongfully brought against him by a stranger, although the proceedings relate to the mortgaged estate (*v*).

It has been held that when a mortgagee is taking steps to sell the property under the power of sale contained in the mortgage it is proper for him to supplement his sale proceedings by an action for possession in order that he may be in a position to deliver possession to the purchaser (*w*).

(*q*) *Farrer v. Lacy, Hartland & Co.*, 1885, 25 Ch. D. 636, 31 Ch.D. 42; cf. *Corsellis v. Patman*, 1867, L.R. 4 Eq. 156; *Cameron v. McDougall*, 1884, 1 M.R. 242; *Patchell v. Colonial Investment and Loan Co.*, 1907, 3 N.B. Eq. 429.

(*r*) *Ramsden v. Langley*, 1706, 2 Vern. 536.

(*s*) *Hunt v. Fownes*, 1803, 9 Ves. 70.

(*t*) *Parker v. Watkins*, 1859, John. 133; *Godfrey v. Watson*, 1747, 3 Atk. 517.

(*u*) Unless the persons interested in the equity of redemption have concurred in or assisted the litigation. *Parker v. Watkins, supra*.

(*v*) *Owen v. Crouch*, 1857, 5 W.R. 545; cf. *Doe d. Holt v. Roe*, 1830, 6 Bing 447.

(*w*) *Trust and Loan Co. v. McGillivray*, 1878, 7 O.P.R. 318. But if notice of exercising the power of sale has been given, no action

It has also been held that a mortgagee is entitled to add to his mortgage debt the costs of an action in ejectment brought by him to recover possession of the mortgaged premises or the costs of an action on the covenant for payment, even though in the latter case the action was abortive (*x*).

§324. *Costs of mortgage action.*

The right of a mortgagee to add to his mortgage debt costs incurred by him in preserving the mortgage property or protecting the mortgage security is based on the maxim that *he who seeks equity must do equity* and not upon an implied contract on the mortgagor's part to pay such costs (*y*). On the other hand, the right of a mortgagee to the costs of and incidental to an action for redemption or foreclosure arises out of the mortgage contract itself, and can be lost only by such inequitable conduct on the part of the mortgagee as to amount to a violation or culpable neglect of duty under the contract (*z*).

The general rule is that costs are in the discretion of the court or judge; and no order as to costs only which by law are left to the discretion of the court is subject to appeal except by leave of the court or judge making the order, but the

may be brought without leave until after the expiration of the time after which according to the notice the power is to be exercised. See chapter 31, *Sale under Power of Sale*, §340.

(*x*) *Sandon v. Hooper*, 1843, 6 Beav. 246; cf. *In re Wallis*, Ex parte Lickorish, 1890, 25 Q.B.D. 176, at p. 181. But according to modern practice a claim for possession, a claim for immediate payment and a claim for foreclosure or sale may all be combined in one action, and the court is inclined to regard as vexatious the bringing of two actions where one action would have sufficed. See chapter 24, *Action for Foreclosure or Sale*, §232.

(*y*) *Supra*, §323.

(*z*) *Detillin v. Gale*, 1802, 7 Ves. 583, 18 R.C. 502; *Cotterell v. Stratton*, 1872, L.R. 8 Ch. 295; *Bank of New South Wales v. O'Connor*, 1889, 14 App. Cas. 273; *Confederation Life Association v. Leier*, 1908, 1 S.L.R. 131; *Heath v. Chinn*, [1908] W. N. 120.

discretion of the court or judge does not extend to deprive a mortgagee of any right to costs out of any particular estate or fund (*a*).

The right of a mortgagee to costs arises out of the mortgage contract, and unless that right has been forfeited for one or more of the reasons that will be discussed presently the mortgagee's costs are not in the discretion of the judge. If, therefore, the judge wrongfully deprives the mortgagee of his costs on the ground that he had forfeited his right arising out of the contract the mortgagee has a right of appeal (*b*).

It would appear that a mortgagor has no right of appeal from an order negating misconduct and allowing the mortgagee his costs, for if the mortgagee has been guilty of misconduct his costs then become costs within the discretion of the judge and there is no appeal from the order without the judge's leave (*c*).

A mortgagee may be deprived of his costs, or even ordered to pay costs, if he resists the right to redeem, makes unfounded claims, improperly refuses to account or causes vexatious delays and unnecessary costs (*d*). A mortgagee who took a deed absolute in form, intended to operate as security, and then denied the right to redeem setting up the deed as constituting an absolute purchase, was ordered to pay the costs of the action for redemption (*e*). Where in a foreclosure action the mort-

(*a*) Ontario Judicature Act, R.S.O. 1914, c. 56, ss. 24, 74.

(*b*) *Charles v. Jones*, 1886, 33 Ch.D. 80; *Turner v. Hancock*, 1882, 20 Ch.D. 303.

(*c*) *Charles v. Jones*, *supra*; cf. *In re Beddoe*, *Downes v. Cottam*, [1893] 1 Ch. 547.

(*d*) *Detillin v. Gale*, 1802, 7 Ves. 583, 18 R.C. 502; *Cotterell v. Stratton*, 1878, L.R. 8 Ch. 295; *Cottrell v. Finney*, 1874, L.R. 9 Ch. 541; *National Bank of Australasia v. United Hand-in-Hand, etc. Co.* 1879, 4 App. Cas. 391; *Bank of New South Wales v. O'Connor*, 1889, 14 App. Cas. 273; *Kinnaird v. Trollope*, 1889, 42 Ch.D. 610; *Bryson v. Huntington*, 1877, 25 Gr. 265; *Miller v. Brown*, 1882, 3 O.R. 210; *Graham v. Ross*, 1883, 6 O.R. 154.

(*e*) *LeTarge v. DeTuyll*, 1852, 3 Gr. 595; *Livingston v. Wood*,

gagee made unfounded charges of fraud against the mortgagor he was disallowed the costs occasioned by his improper conduct (*f*).

A mortgagee will not be deprived of costs merely because he *bona fide* claims more than is due to him (*g*). Where in a redemption action the mortgagee claimed \$905 to be due and the balance due was found to be \$1.32, it was held that as the defendant had advanced his claim honestly and under a reasonable belief that the sum claimed was due he was entitled to the benefit of the rule that a mortgagor coming to redeem is liable for the costs if the balance is found in favour of the defendant (*h*).

A claim by a mortgagee to consolidate securities which is not allowed is not misconduct so as to disentitle him to costs (*i*), but where the mortgagor made a definite offer to redeem and the mortgagee unreasonably refused the offer setting up a groundless claim to consolidate another mortgage, it was held that as the mortgagee's refusal was the sole cause of the litigation he must pay to the mortgagor the costs of the action (*j*).

If the mortgage debt has been paid off before action, or if the amount due is tendered by the mortgagor or by anyone representing him or by a subsequent encumbrancer, and the mortgagee refuses the tender or proceeds after payment, he

1880, 27 Gr. 515; *England v. Codrington*, 1758, 1 Eden 169; *Douglass v. Culverwell*, 1862, 4 DeG. F. & J. 20; *National Bank of Australasia v. United Hand-in-Hand, etc. Co.*, *supra*.

(*f*) *West v. Jones*, 1851, 1 Sim. N.S. 205.

(*g*) *Hodges v. Croydon Canal Co.*, 1840, 3 Beav. 86; *Cotterell v. Stratton*, *supra*; *Cottrell v. Finney*, *supra*; *In re Watts*, *Smith v. Watts*, 1882, 22 Ch.D. 5; *Stone v. Lickorish*, [1891] 2 Ch. 363; *Thomas v. Girvan*, 1897, 1 N.B. Eq. 314; *Dalgneau v. Dagenals*, 1903, 5 O.L.R. 265.

(*h*) *Little v. Brunker*, 1880, 28 Gr. 191.

(*i*) *Stark v. Reid*, 1895, 26 O.R. 257; see *Bird v. Wenn*, 1886, 33 Ch.D. 215.

(*j*) *Squire v. Pardoe*, 1891, 66 L. T. 243, C.A.

will be liable for the costs, but a mere offer to pay the amount due and costs without an actual tender will not be sufficient (*k*).

A mortgagee sold under his power of sale for the sum of \$5517, the whole of which he claimed to be entitled to keep. The mortgagor brought action for an account and for payment of the surplus, and it was found on the reference that the sum of \$136 was due to the mortgagor. It was held that the general rule that a mortgagee is entitled to his costs did not apply, this not being an action for foreclosure or redemption, but a case of the defendant receiving money for the plaintiff and being sued therefor, and the mortgagor was declared to be entitled to his costs of suit (*l*).

A mortgagor, before bringing an action for an account, should, however, make a demand for an account, otherwise he may be disallowed his costs, especially if he makes charges which he fails to substantiate (*m*).

Where the mortgagees refused to assign their mortgage under s. 3 of the Mortgages Act (*n*) to the nominee of the mortgagor on the ground that subsequent mortgagees had not assented, and an application was made to the court for an order directing them to execute an assignment, they were ordered to pay the costs occasioned by their refusal (*o*).

In Ontario under an order of reference the master may report special circumstances (*p*), and if in a mortgage action it is claimed that the mortgagee has disentitled himself to costs or made himself liable to pay costs, the disposition of the costs may be reserved until after the master has made his re-

(*k*) See chapter 25, *Action for Redemption*, §§254, 255.

(*l*) Boulton v. Rowland, 1883, 4 O.R. 720.

(*m*) Beatty v. O'Connor, 1884, 5 O.R. 747.

(*n*) See chapter 20, *Right to Assignment of Mortgage*, §192.

(*o*) Queen's College v. Claxton, 1894, 25 O.R. 282.

(*p*) Rule 410. See chapter 27, *Accounting between Mortgagor and Mortgagee*, §293.

port. The master should report any circumstances bearing on the question of costs (*q*).

If, as is usually the case, the mortgagee is entitled to the costs of a foreclosure or redemption action, the costs are the ordinary party and party costs (*r*). They include the costs of discharge or reconveyance, or of a vesting order where such order was not rendered necessary by the wilful default of the mortgagee (*s*).

The procuring of a copy of evidence taken in the master's office for use on the argument before the master may be taxed and allowed in proper cases. The following items in a defendant's bill in a redemption action were held to be taxable in reference to taking of mortgage accounts in the master's office: (1) attendance by the other party's solicitor on inspection of productions; (2) counsel fee advising on evidence; (3) letter to client to call after service of notice of intention to cross examine on affidavit; (4) attending and copying entries in books of account produced; (5) attendance of client going over accounts and surcharge of plaintiff and considering and advising on; (6) attendance of plaintiff's solicitor going over accounts and discussing and making list of such as can and cannot be agreed upon and admitted; (7) the issue of a new subpoena for witnesses to be examined upon a day subsequent to that for which they were originally subpoenaed and brought into the master's office; (8) attendance by client and advising after arrangement made to proceed with case on a certain day; (9) perusal of accounts and considering and taking instructions for supplemental accounts; (10) counsel fee on reference (*t*).

(*q*) *Simpson v. Horne*, 1880, 28 Gr. 1; *Hayes v. Hayes*, 1881, 29 Gr. 90.

(*r*) *In re Queen's Hotel*, [1900] 1 Ch. 792.

(*s*) *Webb v. Crosse*, [1912] 1 Ch. 323.

(*t*) *Plenderleith v. Parsons*, 1907, 15 O.L.R. 397.

Where a subsequent encumbrancer institutes proceedings to redeem prior encumbrancers and foreclose subsequent encumbrancers and the mortgagor, his costs are added to his mortgage debt and do not take priority over earlier charges (*u*), but if a subsequent encumbrancer takes proceedings the result of which is to secure a fund for the benefit of all encumbrancers, his costs, in so far as the prior encumbrancers have had the benefit of them, will take priority over the other encumbrances (*v*).

Where a defendant in an action for foreclosure or redemption disclaims in such a manner as to show that he never had and never claimed an interest, or if he had an interest that he had disclaimed or offered to disclaim before the action was begun, he is entitled to his costs (*w*). If he neither disclaims or offers to disclaim until he puts in his defence he is not entitled to his costs (*x*).

If a person is properly made a defendant as being interested in the mortgaged property the plaintiff is not required to apply to him in order to ascertain whether or not he claims an interest: but the plaintiff is entitled to a disclaimer from him if he claims no interest (*y*). If a defendant puts in a defence instead of a disclaimer he will not be allowed costs (*z*).

When a person is served with an appointment to attend upon proceedings in the master's office and neglects to attend such non-attendance shall be treated as a disclaimer (*a*), and

(*u*) *Wright v. Kirby*, 1857, 23 Beav. 463.

(*v*) *Ford v. Earl of Chesterfield*, 1856, 21 Beav. 426; *Batten, Proffitt & Scott v. Dartmouth Harbour Commissioners*, 1890, 45 Ch.D. 642.

(*w*) *Teed v. Carruthers*, 1842, 2 Y. & C.C.C. 31; *Ford v. Earl of Chesterfield*, 1853, 16 Beav. 516; *Earl of Cork v. Russell*, 1871, L.R. 13 Eq. 210.

(*x*) *Cash v. Belcher*, 1842, 1 Hare 310; *Grigg v. Sturgis*, 1846, 5 Hare 93.

(*y*) *Maxwell v. Wightwick*, 1866, L.R. 3 Eq. 210.

(*z*) *Bradley v. Borlase*, 1858, 7 W.R. 125.

(*a*) See chapter 24, *Action for Foreclosure or Sale*, §238.

if such person appears and disclaims he is not entitled to costs (b).

§325. *Taxation of costs.*

It is provided in Ontario by the Mortgages Act, R.S.O. 1914, c. 112, s. 30, that where, pursuant to any condition or proviso contained in a mortgage, there has been made or given a demand or notice either requiring payment of the money secured by such mortgage or declaring an intention to proceed under and exercise the power of sale therein contained, if there is a dispute as to the costs payable by the person by whom or on whose behalf payment is made or tendered, the costs shall be taxed by the clerk of the county or district court or by the local master of the county or district in which the mortgaged property or any part thereof is situate (c).

It is also provided by the same section of the statute that a mortgagee's costs of and incidental to the exercise of a power of sale may, without an order, be taxed at the instance of any person interested by one of the taxing officers of the Supreme Court at Toronto or by a local master having jurisdiction in the county or district in which the mortgaged property or any part of it is situate. A local registrar who is not a local master has no jurisdiction (d). No appeal lies from the taxation (e).

If a mortgagee is a solicitor he will not be allowed profit costs, but only costs out of pocket, in respect of any legal proceedings taken by him personally to recover the mortgage debt

(b) *Hatt v. Park*, 1858, 6 Gr. 553; *Lewin v. Jones*, 1884, 51 L.T. 59.

(c) See chapter 31, *Sale under Power of Sale*, §340, where the provisions of ss. 29 and 30 of the statute are quoted.

(d) *Re Drinkwater and Kerr*, 1907, 15 O.L.R. 76.

(e) *Re Vanluven and Walker*, 1900, 19 O.P.R. 216.

(f), but a solicitor acting for himself and a co-mortgagee who is not a solicitor is entitled to profit costs (g). Where the legal proceedings are taken by the firm of which the solicitor mortgagee is a member, his partners will be entitled to the same share of such profit costs as they are entitled to in the general profits of the partnership business (h).

It has been held that a covenant in the mortgage deed to pay profit costs to a solicitor mortgagee would be void as being a contract for a collateral advantage beyond the principal and interest, and the costs to which a solicitor mortgagee is ordinarily entitled (i). In England under the *Mortgages' Legal Costs Act*, 1895 a solicitor who is a mortgagee either alone or jointly with any other person is now entitled to profit costs.

Provision is made by the Solicitors Act, R.S.O. 1914, c. 159, s. 40, as follows:

40.—(1) Where any person, not being chargeable as the principal party, is liable to pay or has paid any bill either to the solicitor, his assignee or personal representative, or to the principal party entitled thereto, the person so liable to pay or paying, his assignee or personal representative, may apply to the court or a judge for an order referring to taxation as the party chargeable therewith might himself have done, and the same proceedings shall be had thereupon as if the application had been made by the party so chargeable.

A mortgagor is a third party within the act so as to entitle him to have the mortgagee's costs taxed (j). Where a first mortgagee sells under the power of sale contained in the mortgage, a subsequent mortgagee is entitled to an order to tax

(f) *In re Wallis, Ex parte Lickorish*, 1890, 25 Q.B.D. 176; *Eyre v. Wynn-Mackenzie*, [1894] 1 Ch. 218; *Stone v. Lickorish*, [1891] 2 Ch. 363.

(g) *Sclater v. Cottam*, 1857, 3 Jur. N.S. 630; *In re Doody, Hilbert v. Lloyd*, [1893] 1 Ch. 129.

(h) *In re Doody, Fisher v. Doody*, [1893] 1 Ch. 129; *Eyre v. Wynn-Mackenzie*, *supra*.

(i) *Eyre v. Wynn-Mackenzie*, *supra*. Under the more recent authorities, however, a stipulation for a collateral advantage is valid if it is not oppressive. see chapter 3, *Legal Mortgage in Equity*, §25.

(j) *Ex parte Glass, Re Macdonald*, 1863, 3 O.P.R. 138.

the first mortgagee's costs of exercising the power, such costs to be taxed as between solicitor and client (*k*).

It has been held that if the mortgagee has paid his solicitor's costs and so precluded himself from taxing the bill, the mortgagor who stands simply in the place of the mortgagee has no right to tax the costs, and that if the mortgagee has paid the solicitor more than the proper costs the mortgagor's only remedy is against the mortgagee for an account (*l*). It is, however, provided by s. 42 of the Solicitors Act as follows:

42. The payment of any bill shall not preclude the court or judge to whom the application is made from referring it for taxation, upon such terms and subject to such directions as to the court or judge may seem just, if the application is made within twelve months after payment, and if the special circumstances (*m*) of the case, in the opinion of the court or judge, appear to require the taxation.

Upon a reference in an action for foreclosure or sale in an action for redemption, of the duties of the master is to tax the costs of the various parties (*n*).

(*k*) *Re Crerar & Muir*, 1879, 8 O.P.R. 56; *Re O'Donohoe*, 1868, 4 O.P.R. 266; *In re Jessop*, 1863, 32 Beav. 406.

(*l*) *Re McDonald, McDonald & Marsh*, 1879, 8 O.P.R. 88; *Re Cronyn, Kew & Betts*, 1880, 8 O.P.R. 372; *Re Massey*, 1865, 34 Beav. 463.

(*m*) See *In re Hirst & Capes*, [1908] 1 K.B. 982, S.C. *sub nom.* *Hirst v. Fox*, [1908] A. C. 416.

(*n*) See chapter 24, *Action for Foreclosure or Sale*, §§239, 241, and chapter 25, *Action for Redemption*, §259.

PART VIII.
STATUTORY OR CONTRACTUAL RIGHTS.

CHAPTER XXXI.

SALE UNDER POWER OF SALE.

- §331. Origin of the power of sale, p. 631.
- §332. Statutory implied power of sale, p. 633.
- §333. Contractual power of sale, p. 638.
- §334. Statutory short form of power of sale, p. 640.
- §335. Qualifications of the short form, p. 642.
- §336. Who may exercise the power, p. 646.
- §337. When the power may be exercised, p. 649.
- §338. Power of sale without notice, p. 653.
- §339. Form and service of notice, p. 654.
- §340. Concurrent proceedings by the mortgagee, p. 662.
- §341. Conduct of the sale, p. 665.
- §342. Who may purchase, p. 673.
- §343. The conveyance and its effect, p. 676.
- §344. Application of the proceeds, p. 680.
- §345. Power of sale under Land Titles Acts, p. 683.

§331. *Origin of the power of sale.*

At common law a mortgage created in favour of the mortgagee an estate upon condition, and the mortgagor's interest in the land was liable to forfeiture on default in strict performance (a). In equity, however, it was held that the mortgagor had an equitable right to redeem after his contractual or legal right was forfeited (b). Until the mortgagee's right

(a) See chapter 2, *Mortgage at Common Law*.

(b) See chapter 3, *Legal Mortgage in Equity*. The mortgagee's estate having become absolute at law he could of course convey the

to a judicial sale was introduced by statute, usually the only way in which the mortgagee could put an end to the mortgagor's equitable right to redeem or equity of redemption was by a suit for foreclosure (*c*).

The necessity thus imposed upon the mortgagee of foreclosing the equity of redemption—a tedious process where there were several subsequent encumbrances and therefore successive periods of redemption—led to the introduction by conveyancers of the power of sale, a remedy intended to afford a simpler and more expeditious mode of getting rid of the mortgagor's equity of redemption and of realizing the mortgage debt.

Courts of equity, however, did not view powers of sale with favour, but regarded them as opposed to the equitable doctrine that the mortgagor had an equity of redemption which could not be got rid of without a decree of foreclosure. Thus in a case in 1738 (*d*) the mortgagor was let in to redeem several years after the exercise of the power, and in 1801 Lord Kenyon, C.J. said:

"In mortgage deeds there is sometimes introduced a clause that the mortgagee may repay himself by sale of the mortgaged premises without the concurrence of the mortgagor; but a court of equity would, I believe, control the exercise of that power." (*e*)

In 1802 (*f*), however, the validity of a power of sale was expressly affirmed, and it was held that the mortgagee might exercise such a power, without the concurrence of the mortgagor, though the latter had covenanted with the mortgagee to join in a sale.

legal estate without an express power of sale, although there might be an equitable interest outstanding in the mortgagor. *Nesbitt v. Rice*, 1864, 14 U.C.C.P. 409.

(*c*) See chapter 24, *Action * - Foreclosure or Sale*, §245.

(*d*) *Croft v. Powel*, 1738, 10 Mod. 603.

(*e*) *King v. Parish of Edington*, 1801, 1 East 288.

(*f*) *Clay v. Sharpe*, 1802, 18 Ves. 346 n., followed in *Cordery v. Morgan*, 1811, 18 Ves. 344, 18 R.C. 442.

It may now be considered as settled that a power of sale is a usual and proper term of the ordinary mortgage deed. This point has arisen in England in cases in which the question before the court was whether a power to mortgage authorized the making of a mortgage containing a power of sale. Malins, V. C., said (*g*):

"I am of opinion that a power of sale is a necessary incident to a mortgage, and that when a testator says that a sum of money is to be raised by mortgage he means it to be raised in the way in which money is ordinarily raised by mortgage, and therefore that that the mortgage may contain what mortgages in general do contain, namely, a power of sale. I entirely agree with what the Master of the Rolls said in *Cook v. Dimeson* (*h*) that a power to mortgage includes a power to give to a mortgagee all such remedies as are proper to be given to him, so as to mortgage the estate on the best terms, and one of these remedies is a power of

In a suit by a vendor for specific performance, where the vendor was ordered to execute a deed and the vendee to execute a mortgage, the opinion was expressed that it would be improper to insert a power of sale in the mortgage (*i*), but in another case (*j*) a decree was made for specific performance of a contract to execute a mortgage containing a power of sale.

The power of sale has also been recognized by legislation. The Short Forms of Mortgages Act (*k*) provides a form of power of sale, and by the Mortgages Act (*l*) an implied power of sale is given to mortgagees in certain circumstances.

§332. *Statutory implied power of sale.*

In England prior to the passing of Lord Cranworth's Act

(*g*) In *re Chawner's Will*, 1869, L.R. 8 Eq. 569.

(*h*) 1861, 29 Beav. 123 at p. 128.

(*i*) *McKay v. Reed*, 1864, 1 Chy. Ch. (U.C.) 208.

(*j*) *Ashton v. Corrigan*, 1871, L.R. 13 Eq. 76; cf. *Hermann v. Hodges*, 1873, L.R. 16 Eq. 18.

(*k*) See §333, *infra*.

(*l*) See §332, *infra*.

(*m*), in order that a mortgagee might sell the mortgaged lands without judicial proceedings it was necessary that a power of sale should be given expressly by the mortgage deed. By that act a power of sale was implied in certain cases. The sections of Lord Cranworth's Act relating to implied powers of sale were repealed by the Conveyancing Act, 1881 (*n*), but not so as to affect mortgages made prior to 1882. The last mentioned statute (s. 19) gives to a mortgagee whose mortgage is made by deed a power of sale somewhat similar to the power given in Ontario by the Mortgages Act, except in so far as a contrary intention is expressed in the mortgage deed, and subject to the terms of the mortgage deed. The statute also provides as follows:

20. A mortgagee shall not exercise the power of sale conferred by this Act unless and until—

(i) Notice requiring payment of the mortgage money has been served on the mortgagor or one of several mortgagors, and default has been made in payment of the mortgage money, or of part thereof, for three months after such service (*o*); or

(ii) Some interest under the mortgage is in arrear and unpaid for two months after becoming due; or

(iii) There has been a breach of some provision contained in the mortgage deed or in this Act; and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage money or interest thereon.

It is provided in Ontario by the Mortgages Act, R.S.O. 1914, c. 112, as follows (*p*):

19. Where any principal money is secured by mortgage of land executed after the 11th day of March, 1879, the mortgagee shall, at any time after the expiration of four months from the time when the principal money shall have become payable, according to the terms of the mortgage, or after any interest on the principal money shall have been in arrear for six months, or after any omission to pay any premium on any insurance which, by the terms of the mortgage,

(*m*) 23 & 24 V. c. 115 (1860).

(*n*) 44 & 45 V. c. 41.

(*o*) See § 337, *infra*.

(*p*) By s. 2 "mortgagee" includes any person deriving title under the original mortgagee.

ought to be paid by the mortgagor, have the following powers to the like extent as if they had been in terms conferred by the mortgage but not further, namely:

- (a) A power to sell, or concur with any other person in selling, the whole or any part of the mortgaged property by public auction or private contract, subject to any reasonable conditions he may think fit to make, and to buy in at an auction and to rescind or vary contracts for sale, and to resell the land, from time to time, in like manner without being answerable for any loss occasioned thereby;
- (b) A power to insure and keep insured against loss or damage by fire any building or any effects or property of an insurable nature, whether affixed to the freehold or not, being or forming part of the mortgaged property, and the premiums paid for any such insurance shall be a charge on the mortgaged property, in addition to the mortgage money and with the same priority and with interest at the same rate as the mortgage money (q).

20. A receipt for purchase money given by the person exercising the power of sale by the next preceding section conferred, shall be a sufficient discharge to the purchaser, who shall not be bound to see to the application of the purchase money.

21.—(1) No sale under the power conferred by section 19 shall be made until after two months' notice in writing, form 1, has been given to every subsequent encumbrancer, and to the mortgagor, either personally or at his usual or last place of residence in Ontario.

(2) The notice may be given at any time after any default in making a payment provided for by the mortgage.

(3) In case of the death of the person entitled subject to the mortgage, and of his interest passing to an infant, the notice shall be given to his personal representative as well as to the infant.

(4) The notice to the infant shall be served upon his guardian, and if he has no guardian, upon the Official Guardian, and in every case upon the infant himself if over the age of twelve years.

22. Where a conveyance has been made in professed exercise of the power of sale conferred by section 19 the title of the purchaser shall not be liable to be impeached on the ground that no case had arisen to authorize the exercise of such power, or that such power had been improperly or irregularly exercised, or that such notice has not been given; but any person damaged by an unauthorized, improper or irregular exercise of the power, shall have his remedy against the person exercising the power.

23. The money arising from the sale shall be applied by the person receiving the same as follows:

(q) See chapter 34 *Fire Insurance*, §372.

Firstly, in payment of all the expenses incident to the sale or incurred in any attempted sale;

Secondly, in discharge of all interest and costs then due in respect of the mortgage under which the sale was made;

Thirdly, in discharge of all the principal money then due in respect of such mortgage; and

Fourthly, in payment of the amounts due to the subsequent encumbrancers according to their priorities;

and the residue shall be paid to the mortgagor.

24. The person exercising the power of sale shall have power to convey or assign to and vest in the purchaser the property sold, for all the estate and interest therein of the mortgagor and of which he had power to dispose.

25. At any time after the power of sale shall have become exercisable, the person entitled to exercise the same shall be entitled to demand and recover from the mortgagor all deeds and documents in his possession or power relating to the mortgaged property, or to the title thereto, which he would have been entitled to demand and recover if the property had been conveyed, appointed, surrendered or assigned to and was then vested in him for all the estate and interest of the mortgagor and of which he had power to dispose; and where the legal estate is outstanding in a trustee the mortgagee, or any purchaser from him, shall be entitled to call for a conveyance of the legal estate to the same extent as the mortgagor could have called for such a conveyance if the mortgage had not been made.

26. So much of this Part as confers a power to sell shall not apply in the case of a mortgage which contains a power of sale except as in section 27 provided; and so much as confers a power to insure shall not apply in the case of a mortgage which contains a power to insure; nor shall any of the provisions of this Part apply to a mortgage which contains a declaration that this Part shall not apply thereto.

27.—(1) Where a mortgage made in pursuance of *The Short Forms of Mortgages Act* contains a power of sale in the form no. 14, in Column One of Schedule B to that Act, the mortgagee may, in exercising the power, in lieu of taking the proceedings provided for by such form, Column Two, take proceedings under and have the benefit of the provisions of this Part, except that such power shall not be exercisable until after at least four months' default and at least two months' notice, or such longer periods as may by the power contained in such mortgage be fixed therefor, and this Part shall apply to a sale made under such power.

(2) Where a mortgage purporting to be made in pursuance of *The Short Forms of Mortgages Act* contains a power of sale which provides for a sale without notice, the mortgagee may take proceedings to sell under and have the benefit of the provisions of

this Part as fully and effectually as if the mortgage had not contained a power of sale.

(3) Subsection 2 shall apply to all mortgages whether heretofore or hereafter made (*r*).

Form 1, referred to in s. 21 is as follows:

NOTICE OF SALE UNDER MORTGAGE.

I hereby require you on or before the day of 19 ,
(a day not less than two calendar months from the service of the
notice, and not less than six months after the default), to pay off
the principal money and interest secured by a certain mortgage dated
the day of 19 , and expressed to be made between
(here state parties and describe mortgaged property), which mort-
gage was registered on the day of 19 (and if the
mortgage has been assigned add: and has since become the property
of the undersigned). And I hereby give you notice that the amounts
due on the said mortgage for principal, interest, and costs respect-
ively, are as follows: (*set the same forth*).

And unless the principal money, interest and costs are paid on
or before the said day of 19 , I shall sell the
property comprised in the said mortgage under the authority of *The
Mortgages Act*.

Dated the day of 19 .

The foregoing provisions do not apply to a mortgage which
contains an express power of sale except in the two cases pro-
vided by s. 27. They do not apply, for instance, if the mort-
gage is not made in pursuance of the Short Forms of Mort-
gages Act and contains an express power of sale which for
any reason is defective, or if the mortgage is made in pur-
suance of the act and contains a power of sale which departs
from the short form in any respect other than in providing
for a sale without notice.

Other questions arising under the foregoing provisions or
with regard to their subject matter will be discussed below (*s*).

(*r*) Sub-s. 1 dates from 1888 and sub-s. 2 from 1890. As to the
decisions which were the cause of the passing of these amendments,
see §335, *infra*.

(*s*) As to notice of exercising the power of sale, see §339; as to
the conduct of the sale, see §341; as to the conveyance and its effect,
see §343; as to the application of the proceeds of the sale, see §344.

§333. *Contractual power of sale.*

In Ontario the ordinary practice is to use the short form of power of sale provided by the *Short Forms of Mortgages Act* (*t*) with such qualifications and additions as may seem advisable.

An express power of sale may, however, take various forms. It may be in the form of a trust for reconveyance on payment of the mortgage debt on the day appointed, and in default of payment for sale, or the estate may be limited to the use of the mortgagee for a term of years with a proviso for redemption, and subject thereto to the use of trustees in fee simple upon trust to sell. The estate may also be limited at once to trustees in fee simple to sell if the mortgage moneys are not paid by the appointed time, with a proviso for redemption.

The appointment of third persons as trustees for sale is, however, not desirable, as this course may occasion delay, inconvenience and greater expense. A mortgagee exercising the power of sale will not be subject to the same restraint as a trustee. Thus where the power of sale was vested in a trustee the court, on the application of the mortgagor, restrained the sale until the trustee should give notice to both the mortgagee and the mortgagor, upon the ground that it was the duty of the trustee to attend to the interests of both mortgagee and mortgagor, but in the same case a motion to restrain the mortgagee from proceeding without notice, made under the apprehension that the power was vested in the mortgagee, had been previously refused (*u*).

The following form of power of sale may be adopted :

Provided that the said mortgage on default of payment for [one month] may on [one month's] notice enter on and lease or sell the said lands (*v*).

(*t*) See §334, *infra*.

(*u*) Anon, 1821, 6 Madd. & G. 10.

(*v*) The first clause in the suggested power of sale follows the

Provided also that such notice may be effectually given either by the leaving of the same with a grown up person on the said lands if occupied or by the placing of it thereon if unoccupied or at the option of the mortgagee by the mailing of the same in a registered letter addressed to the mortgagor at or by the publication of the same once in some newspaper published in the county in which said lands are situate and shall be sufficient though not addressed to any person or persons by name or designation and notwithstanding any person or persons to be affected thereby may be unborn, unascertained or under disability; and that should default continue for two months a sale may be made hereunder by public auction or private contract or partly one or partly the other, with or without entry on said lands and without any notice whatsoever; and that the whole or any part or parts of the said lands may be sold; and that the proceeds of any sale hereunder may be applied in payment of any costs, charges and expenses incurred about taking, recovering or keeping possession of the said lands or by reason of non payment or procuring payment of moneys secured hereby or otherwise; and that the mortgagee may sell any of the said lands on such terms as to credit and otherwise as shall appear to him most advantageous and for such prices as can reasonably be obtained therefor and may make any stipulations as to title or evidence or commencement of title or otherwise which he shall deem proper; and may buy in or rescind or vary any contract for the sale of the whole or any part of the said lands and re-sell without being answerable for loss occasioned thereby, and in the case of a sale on credit the mortgagee shall be bound to pay the mortgagor only such moneys as have been actually received from purchasers after the satisfaction of the claims of the mortgagee, and for any of said purposes may make and execute all agreements and assurances as he shall think fit; and that any purchaser or lessee shall not be bound to see to the propriety or regularity of any sale or lease or be affected by express notice that any sale or lease is improper; and that no want of notice or publication when required hereby shall invalidate any sale or lease hereunder; and that the mortgagee shall have power to convey or assign to and vest in the purchaser the property sold, for all t

short form provided by the Short Forms of Mortgages Act, the blank in that form to be filled by the words within square brackets or such other words indicating the period of default and the length of notice as the parties may agree upon. As to the care to be exercised in making any change in the wording of the short form, see §335, *infra*. If the form is strictly followed and the mortgage is expressed to be made pursuant to the Short Forms of Mortgages Act, the word "mortgagee" includes the mortgagee's "heirs, executors, administrators or assigns" and in other respects the power operates as if it were expressed in the corresponding extended form. See §334, *infra*.

estate and interest therein of the mortgagor and of which he has power to dispose (*w*).

14. *Statutory short form of power of sale.*

The short form of power of sale provided in Ontario by the Short Forms of Mortgages Act (*x*) is as follows:

Provided, that the said mortgagee on default of payment for
may on notice enter on and lease
or sell the said lands.

In the case of a mortgage expressed to be made in pursuance of the statute, the foregoing power of sale has the same effect as if it were in the following terms (*y*) :

Provided always, and it is hereby declared and agreed by and between the parties to these presents, that if the said mortgagor, his heirs, executors or administrators, shall make default in any payment of the said money or interest or any part of either of the same, according to the true intent and meaning of these presents, and of the proviso in that behalf hereinbefore contained, and shall have thereafter elapsed without such payment being made (of which default, as also of the continuance of the said principal money and interest, or some part thereof, on this security, the production of these presents shall be conclusive evidence), it shall and may be lawful to and for the said mortgagee, his heirs, executors, administrators or assigns, after giving written notice to the said mortgagor, his heirs, executors, administrators or assigns, of his or their intention in that behalf, either personally or at his or their usual or last place of residence within this Province not less than previous, without any further consent or concurrence of the said mortgagor, his heirs, executors, administrators or assigns, to enter into possession of the said lands, tenements, hereditaments and premises hereby conveyed, or mentioned or intended so to be, and to receive and take the rents, issues and profits thereof, and whether in

(*w*) Whenever the word "mortgagee" occurs in a special provision not taking effect by virtue of the Short Forms of Mortgages Act, it should be followed by the words "his heirs, executors, administrators or assigns," unless there is in the mortgage a general provision that the powers given to the mortgagee may be exercised by, or that the mortgagee shall be deemed to include, his heirs, executors, administrators or assigns. See §335, *infra*.

(*x*) R.S.O. 1914, c. 117, schedule B, clause 14.

(*y*) See chapter 35, *Short Forms of Mortgages Act*, §381.

or out of possession of the same, to make any lease or leases thereof, or of any part thereof as he or they shall think fit, and also to sell and absolutely dispose of the said lands, tenements, hereditaments and premises hereby conveyed or mentioned, or intended so to be, or any part or parts thereof, with the appurtenances, by public auction or private contract, *i. e.* partly by public auction and partly by private contract, as to him or them shall seem meet, and to convey and assure the same when so sold unto the purchaser or purchasers thereof, his or their heirs, or assigns, or as he or they shall direct and appoint and to execute and do all such assurances, acts, matters, and things as may be found necessary for the purposes aforesaid, and the said mortgagee, his heirs, executors, administrators or assigns shall not be responsible for any loss which may arise by reason of any such leasing or sale as aforesaid unless the same shall happen by reason of his or their wilful neglect or default; and it is hereby further agreed between the parties to these presents, that, until such sale or sales shall be made as aforesaid, the said mortgagee, his heirs, executors, administrators or assigns shall and will stand and be possessed of and interested in the rents and profits of the said lands, tenements, hereditaments, and premises, in case he or they shall take possession of the same on any default as aforesaid, and after such sale or sales shall stand and be possessed of and interested in the moneys to arise and be produced by such sale or sales, or which shall be received by the mortgagee, his heirs, executors, administrators or assigns, by reason of any insurance upon the said premises or any part thereof, upon trust in the first place to pay and satisfy the costs and charges of preparing for and making sales, leases and conveyances as aforesaid, and all other costs and charges, damages and expenses which the said mortgagee, his heirs, executors, administrators or assigns, shall bear, sustain, or be put to for taxes, rents, insurances and repairs, and all other costs and charges which may be incurred in and about the execution of any of the trusts in him or them hereby reposed, and in the next place to pay and satisfy the principal sum of money and interest hereby secured or mentioned or intended so to be or so much thereof as shall remain due and unsatisfied up to and inclusive of the day whereon the said principal sum shall be paid and satisfied; and after full payment and satisfaction of all such sums of money and interest as aforesaid, upon this further trust that the said mortgagee, his heirs, executors, administrators or assigns, do and shall pay the surplus, if any, to the said mortgagor, his heirs, executors, administrators or assigns, or as he or they shall direct and appoint, and shall also, in such event, at the request, costs and charges in the law of the said mortgagor, his heirs, executors, administrators or assigns, convey and assure unto the said mortgagor, his heirs, executors, administrators or assigns, or to such person or persons as he or they shall direct and appoint, all such parts of the said lands, tenements,

hereditaments and premises as shall remain unsold for the purposes aforesaid, freed and absolutely discharged of and from all estate, lien, charge and incumbrance whatsoever by the said mortgagee, his heirs, executors, administrators or assigns, in the meantime, but so as no person who shall be required to make or execute any such assurances, shall be compelled for the making thereof to go or travel from his usual place of abode; Provided, always, and it is hereby further declared and agreed by and between the parties to these presents, that notwithstanding the power of sale and other the powers and provisions contained in these presents, the said mortgagee, his heirs, executors, administrators or assigns, shall have and be entitled to his right of foreclosure of the equity of redemption of the said mortgagor, his heirs, executors, administrators and assigns in the said lands, tenements, hereditaments and premises as fully and effectually as he or they might have exercised and enjoyed the same in case the power of sale, and the other former provisos and trusts incident thereto had not been herein contained.

The construction placed upon some of the clauses in the extended form will be discussed below (z). Express exceptions from or qualifications of the short form may be introduced into it or annexed to it (a), and it is also advisable in any case to add special provisions (b).

§335. *Qualifications of the short form of power of sale.*

The Short Forms of Mortgages Act provides that the parties may introduce into, or annex to any of the short forms any express exceptions therefrom or express qualifications thereof; and the like exceptions and qualifications shall be taken to be made from or in the corresponding extended forms (c), but in order to obtain the benefit of the extended form, care

(z) As to the provision with regard to service on the mortgagor at his usual or last place of residence within the province, see §339; as to the manner of selling and the conduct of the sale, see §341; as to the conveyance and its effect, see §343; as to the application of the proceeds of the sale, see §344.

(a) See §335, *infra*.

(b) See §333, *supra*.

(c) R.S.O. 1914, c. 117, s. 4 (3). See chapter 35, *Short Forms of Mortgages Act*, §381. The short form and the corresponding extended form of power of sale are set out in §334.

should be taken to avoid any change in the wording of the short form otherwise than by way of express exception or qualification. If the wording used is not in conformity with the short form, it will have effect according to ordinary rules of construction without reference to the extended form (*d*).

An assignee of a mortgage is not entitled to exercise the power of sale unless it is expressly reserved to him (*e*). No difficulty arises in this respect if a sale is made under the short form because the corresponding extended form provides that the power may be exercised by the mortgagee, his heirs, executors, administrators or assigns, but to enable the assignee of a mortgage to sell under a special power of sale which is not in conformity with the statute and which operates without reference to the extended form, it is necessary that the power should by its terms be exercisable by the assigns of, or by persons claiming under, the original mortgagee (*f*).

A power of sale was in the following words: "Provided that the said mortgagee, on default of payment for two months, may without giving any notice, enter on and lease or sell the said lands," and it was held that this was neither an exception from or a qualification of the form provided by the statute, but an abolition of one of its most important terms, that is, that written notice should be given to the mortgagor. The power, therefore, was personal to the mortgagee and could not be exercised by his assigns (*g*). In a subsequent case, where the power was in the following words: "Provided that the mortgagee on default of payment for one day may, without any notice, enter on and lease or sell said lands," a divisional

(*d*) Cf. R.S.O. 1914, c. 117, s. 5, in §381.

(*e*) See §336, *infra*.

(*f*) It would of course be sufficient to have a general provision in the mortgage that the word "mortgagee" means the "mortgagee, his heirs, executors, administrators or assigns."

(*g*) *Re Gilchrist and Island*, 1886, 11 O.R. 537.

court was divided in opinion on the question whether the power was operative under the statute (*h*).

Prior to 1910 (*i*) the short form was as follows: "Provided that the mortgagee on default of payment for months may on notice enter on and lease or sell the said lands" (*j*), and it was held that the substitution of the word "month" for the word "months" was not a material alteration, and that the assignee of the mortgage might exercise a power of sale which was expressed to be exercisable on default of payment for one month (*k*). So, it has been held that the insertion of the word "calendar" before the word "month" is not a material alteration (*l*).

From a subsequent case in the Court of Appeal (*m*) it appears that a special power of sale may be so worded as to import into it by relation all the provisions of the extended form except as varied by the terms of the special power. The terms of the special power and the decision of the court are sufficiently set out in the following extract from the judgment of Osler, J.A. (*n*):

"There is first the usual short form clause of power of sale after notice which must be read, in accordance with the Act and clause 3 of the Directions, R.S.O. (1887) ch. 107, Schedule B, Form 14, in the extended form, the substitution of the word 'month' for 'months,' if important, being in my humble judgment an express qualification within the meaning of the Act, of Form 14 in the first column of the schedule. Then follows a separate clause: 'Provided also that in case default be made in payment of either principal or interest for two months after any payment of either falls due, the said power of sale and entry may be acted upon without any notice.' This clause is to be read just as if the previous clause had been set forth in its

(*h*) *Clark v. Harvey*, 1888, 16 O.R. 159.

(*i*) 10 E. 7, c. 55, schedule B.

(*j*) R.S.O. 1897, c. 126, schedule B.

(*k*) *Re Green and Artkin*, 1887, 14 O.R. 697.

(*l*) *Re Cotter*, 1903, 14 M.R. 485.

(*m*) *Barry v. Anderson*, 1891, 18 O.A.R. 247: cf. *Re Cotter*, 1903, 14 M.R. 485.

(*n*) 18 O.A.R. at pp. 248, 249.

extended form, since that clause is, as I hold, in exact compliance with the Act, and is therefore to be construed as if it had been in the form of words in column 2 of the schedule, the extended form. Reading the second clause as following the extension it declares that in the event it provides for, the said power of sale and entry may be acted upon without notice. All the terms of that power, therefore, except as varied by the terms of the second clause, are brought into that clause by relation, and among those terms is the provision that it may be exercised by the heirs, executors, administrators or assigns of the mortgagee. The next aids this construction by providing that 'any sale under the power may be varied or rescinded. And also that the said mortgagees, their heirs, executors, administrators and assigns may buy in and resell without being responsible for any loss or deficiency on resale.' The case appears to me distinguishable from *Re Gilchrist and Island and Clark v. Harvey* (o), where the mortgages did not contain the symbolical form given in column 1 of the schedule, and it therefore became impossible to revert to the exponential form in column 2. It is plain, for the reasons already given, that no such difficulty exists here."

By the Mortgage Amendment Act, 1888 (p), there was enacted the provision which was afterwards incorporated in the Act respecting Mortgages of Real Estate, R.S.O. 1897, c. 121, s. 34, as follows (q) :

34. No sale made prior to the 23rd day of March, 1888, shall be declared to be invalid on the ground, or by reason only of the same having been made in pursuance of a power of sale contained in a mortgage where such power has been exercised by an assignee of such mortgage instead of the original mortgagee unless within two years after the making of any such sale, proceedings have been taken to declare the same to be invalid or irregular; but nothing in this section contained shall be deemed or construed to confirm any such sale which for any other reason or any other ground might be set aside, or declared irregular or invalid; nor shall anything herein contained affect any proceeding, suit or matter, adjudged or determined before or pending at the said date or brought within three months thereafter.

In 1888 (r) and 1890 (s) there were enacted the provis-

(o) Cited *supra*.

(p) 51 V. c. 15, s. 5.

(q) Left unrepealed by 10 E. 7, c. 51, s. 30, but not incorporated in the revised Mortgages Act.

(r) 51 V. c. 15, s. 4.

(s) 53 V. c. 27, s. 1.

ions which are now contained in s. 27 of the Mortgages Act (*t*).

In the case of a sale made under the short form it is not necessary that the sale should be preceded by an entry, because under the extended form the mortgagee may exercise the power "whether in or out of possession." Opinions have differed whether under a power to enter on or lease or sell the lands which does not operate under the statute, there must be an entry before the sale (*u*).

§336. *Who may exercise the power.*

The assignment of the mortgaged land and of the mortgage debt does not enable the assignee to exercise a power of sale in the mortgage unless the power is by its terms exercisable by the assigns of the mortgagee or by persons claiming under the mortgagee (*v*). In Ontario no difficulty in this respect arises if a sale is made under the implied power of sale provided for by the Mortgages Act (*w*), because in that statute the word mortgagee is defined as including any person deriving title under the original mortgagee; nor does any difficulty arise in the case of a sale under a power of sale expressed in the short form provided by the Short Forms of Mortgages Act (*x*) because by the corresponding extended form the power is exercisable by the mortgagee, his heirs, executors, administrators or assigns. In a special contractual power of sale not operating under the last mentioned statute, however, it is necessary that express provision should be made for the exercise

(*t*) See §332, *supra*.

(*u*) *Clark v. Harvey*, 1886, 16 O.R. 159; *Pottruff v. Tweedle*, (not reported) referred to in *Anderson v. Hanna*, 1889, 19 O.R. 58 at p. 65.

(*v*) *Re Gilchrist and Island* 1886, 11 O.R. 537; *In re Rumney and Smith*, [1897] 2 Ch. 351.

(*w*) See §332, *supra*.

(*x*) See §334, *supra*.

the power by the assignee of the mortgage or by persons deriving title under the original mortgagee (y).

Formerly under the short form of power of sale the power was by the corresponding extended form expressed to be exercisable by the mortgagee, his heirs or assigns (z), but under the later statutes the power is expressed to be exercisable also by the executors or administrators of the mortgagee (a), the personal representatives being the persons in whom the mortgage estate vests and who are entitled to receive the mortgage money and assign or discharge the mortgage (b).

A mortgagee may specially appoint an attorney to exercise the power of sale as authorized by a general authority to the attorney to sell and convey property and by his principal mortgagee by a special power of attorney to enforce the principal's security by sale. An authority merely to sell any property belonging to the principal and to give a discharge for an amount owing to the principal by virtue of any security will not, however, be sufficient to enable the attorney to exercise a power of sale in a mortgage. An authority in such terms would authorize only the sale of the mortgaged property, not the sale and destruction of the mortgage as equivalent of redemption (c). A power of attorney to enable an agent to convey the legal title must include:

Mortgagees by a power of attorney authorized their agent to enter and take possession of the mortgaged lands and sell the same at public or private sale and for the best price that

See §335, *supra*. A special form of power of sale is suggested in §333, *supra*.

1877, c. 104.

1887, c. 107; R.S.O. 1897, c. 126; R.S.O. 1914, c. 117.

Chapter 13, *Persons entitled on Death of the Mortgagee*, §§123 and 124.

(c) *In re Dawson and Jenkins's Contract*, [1904] 2 Ch. 19.

(d) *Hesse v. Briant*, 1856, 2 Jur. N.S. 522.

could be obtained for them, and to execute all necessary receipts, etc., which receipts "should effectually exonerate every purchaser or other person taking the same from all liability of seeing to the application of the money therein mentioned to be received and from being responsible for the loss, misapplication or non-application thereof." The agent took possession and sold the land, receiving part of the purchase money in cash and the balance in a promissory note of the purchaser payable to himself, which he caused to be discounted; and he appropriated the proceeds. The purchaser paid the note to the holders at maturity. It was held that the power of attorney did not authorize a sale upon credit, and the sale by the agent was therefore invalid, and the purchaser was not relieved by the above clause from seeing that the authority of the agent was rightly exercised. The sale being invalid the subsequent payment of the note by the purchaser could not make it good (*e*).

Where the power of sale was, in a mortgage in fee, reserved to the mortgagee, his heirs, executors, administrators or assigns, and the mortgage was assigned, and the legal estate conveyed by the heir of the assignee to a trustee in trust for the administrator of the assignee, it was held that the administrator could exercise the power of sale (*f*).

Where a mortgage, made to trustees of a marriage settlement, contained a power of sale which was not in conformity with the Short Forms of Mortgages Act, and the mortgage was on the resignation of the trustees assigned to a new trustee appointed in their place, it was held that the new trustee stood in the place of the former trustees and could exercise the power of sale, not as assignee of the estate, but as if appointed a trustee by the deed creating the trust (*g*).

(*e*) *Rodburn v. Swinney*, 1889, 16 Can. S.C.R. 297.

(*f*) *Saloway v. Strawbridge*, 1885, 1 K. & J. 371, 7 DoG. M. & G. 594.

(*g*) *Re Gilmour and White*, 1887, 14 O. 2, 694.

Prior to 1st of July, 1886, the survivor of two or more mortgagees could not exercise the power of sale unless the mortgage contained an express declaration that the loan was made out of moneys belonging to the mortgagees on a joint account (*h*), but where after 1st of July, 1886, a mortgage is made to more persons than one jointly and not in shares the mortgage money is deemed to be money belonging to the mortgagees on a joint account, unless a contrary intention is expressed in the mortgage (*i*); and the survivor or survivors of the mortgagees may exercise the power of sale.

Where a mortgage is made to several mortgagees to secure distinct sums advanced by them, it would appear that all the surviving mortgagees and the personal representatives of deceased mortgagees must concur in exercising the power of sale, unless the mortgage contains a provision that the power may be exercised by one or more of the mortgagees or by the survivor or survivors (*j*).

If the first and the second mortgagees have powers of sale both may concur in selling (*k*), and a mortgagee of a life estate may concur with a mortgagee of the remainder in selling the fee simple in possession (*l*).

§337. *When the power may be exercised.*

In England under Lord Cranworth's Act (*m*) a mortgage could not sell until after the expiration of one year from the time when the principal had become payable or unless interest was in arrear for six months, or unless there had been a breach of a covenant to insure against fire. Similar limitations are

(*h*) *Hind v. Poole*, 1855, 1 K. & J. 383.

(*i*) R.S.O. 1914, c. 133, s. 4. See chapter 13, *Persons entitled on Death of the Mortgagee*, §124.

(*j*) Cf. Coote, *Law of Mortgages*, 8th ed., p. 915.

(*k*) *McCarogher v. Whieldon*, 1864, 34 Beav. 107.

(*l*) *In re Cooper and Allen's Contract*, 1876, 4 Ch.D. 802.

(*m*) 23 & 24 V. c. 145. See §352, *supra*.

expressed in Ontario in the statutory power contained in the Mortgages Act (*n*), except that the default in payment of principal need only be for four months. The notice may, however, be given at any time after any default in making a payment provided for by the mortgage. The English Conveyancing Act, 1881, confers a power of sale, "when the mortgage money has become due," but the power of sale is subject to certain conditions already mentioned (*o*).

A notice served by a mortgagee, after the mortgage money has become payable, requiring payment at the expiration of three months from the date of the notice, is a good notice under s. 20 of the Conveyancing Act, 1881. The three months default in payment mentioned in the section begins to run from the service of such a notice, not from the date fixed by the notice for payment (*p*).

In the case of an express power of sale, the time when the power may be exercised will be governed by the terms of the power.

Where the power of sale was in these words: "Provided that the mortgagees, on default of payment for three months, may enter on and lease or sell the lands without notice," and a covenant followed, "And the mortgagees covenant with the mortgagors that no sale or lease of the said lands shall be made or granted by them until such time as one month's notice in writing shall have been given to the mortgagors," it was held, in an action by the mortgagors to set aside the sale, that the mortgagees were not bound to wait until default had been made for three months before serving the notice, in other words that the month's notice might be concurrent with the default (*q*). Where, however, the power of sale provided

(*n*) See §332, *supra*.

(*o*) See §332, *supra*.

(*p*) *Barker v. Hingworth*, [1908] 2 Ch. 20, distinguishing *Schwinn v. Garfit*, 1888, 38 Ch.D. 273.

(*q*) *Grant v. Canada Life Assurance Co.*, 1881, 29 Gr. 256.

that after default of payment for one month and upon one month's notice of sale the land might be sold, it was held that the default and the notice could not run concurrently (*r*).

It has been held that the mortgagee may enter into an agreement for sale before the power of sale is exercisable, if it is not to be carried into execution until the power becomes exercisable (*s*).

It is not unusual, where a new mortgagee is advancing money for the purpose of paying off persons entitled to old securities, to take an assignment of the old securities so as to keep them alive as a protection to the new mortgagee against encumbrances which may have been made by the mortgagor in the interval between the old securities and the new mortgage. Where, upon the making of a new advance and the taking of new security, it was recited that the power of sale under an earlier mortgage "has not been and is not intended to be exercised," it was held that the power of sale was not destroyed but that all that was meant by the recital was that the power of sale had not been exercised and that it was not intended to exercise it at present, or for a certain time, or in any manner inconsistent with the stipulations connected with the new advance (*t*).

If sale proceedings are begun in consequence of the mortgagor's default in payment of an instalment of interest, and the principal has become due by virtue of an acceleration clause in the short form contained in schedule B to the Short Forms of Mortgages Act, so that the relieving provision in the corresponding extended form is available to the mortgagor, the latter may pay the instalment in arrear and become en-

v *Gibbons v. McDougall*, 1879, 26 Gr. 214.

(*s*) *Farrar v. Farrars*, 1888, 40 Ch.D. 395; *Major v. Ward*, 1847 5 Haro 598.

(*t*) *Boyd v. Petrie*, 1872, L.R. 7 Ch. 385, 14 R.C. 760.

titled to have the sale proceedings stayed (*u*). On the other hand where the mortgagee on default in payment of an instalment gives notice to the mortgagor requiring payment of the whole debt, he is not entitled to withdraw the notice without the consent of the mortgagor (*v*).

A sale under the power of sale is a "proceeding" to recover out of land money secured by mortgage, within the meaning of s. 24 of the Limitations Act, and the mortgagee's right to sell will be barred after the expiration of ten years from the time when the right to receive the mortgage money accrued or from the time of the last payment or acknowledgement (*w*).

The defendants advertised an auction sale of mortgaged lands situate near Kincardine to take place there on January 19th. At eleven a.m. on January 17th the mortgagor telegraphed to the defendants at Toronto to inquire the amount required to redeem it and the defendants telegraphed a reply. At 10 a.m. on January 19th the defendants received at Toronto the amount named, but in accordance with their office procedure, the accountant was not aware of this till about eleven a.m., when knowing the property was up for sale, he telegraphed and telephoned the fact to Kincardine. The sale had, however, been made a few minutes before to the plaintiff. The defendants then returned the money to the mortgagor. It was held that the plaintiff was entitled to specific performance, for the mortgagor had not tendered the amount such reasonable time before the sale as to make it obligatory on the defendants to receive it in payment (*x*).

(*u*) *Todd v. Linklater*, 1901, 1 O.L.R. 103. See chapter 23, *Action on the Covenant*, §226.

(*v*) *Santley v. Wilde*, [1899] 1 Ch. 747, at p. 763, S. C. reversed on another point, [1899] 2 Ch. 471.

(*w*) *McDonald v. Grundy*, 1904, 8 O.L.R. 113. See chapter 20, *Limitation of Actions*, §264.

(*x*) *Gentles v. Canada Permanent and Western Canada Mortgage Corporation*, 1900, 32 O.R. 428.

§338. *Power of sale without notice.*

It has sometimes been said that a power of sale without notice is oppressive (*y*), but the validity of such a power has long been established (*z*). It is reasonable and not unusual for a mortgagee who has a power of sale without notice nevertheless to give notice to the persons equitably interested. The fact that the mortgagee gives notice to such persons or some of them will not prevent him from relying upon his power of sale without notice, where, for instance, there is also a power of sale after notice and the sufficiency of the notice or notices given is attacked (*a*).

It is usual to insert in the mortgage a power of sale after a certain default and upon notice, and a further power of sale without notice after a longer period of default (*b*).

Where a deed, absolute in form, is taken as security for a debt, it has been held that the grantee has no power of sale, unless indeed a statutory power of sale can be imported into the deed; nor can the mortgagee foreclose; he holds the land as trustee, and his only remedy, in the absence of the concurrence of the mortgagor, is to have a sale through the court (*c*). The grantee in such case might, however, confer a good title upon a purchaser in good faith without notice

(*y*) *Miller v. Cook*, 1870, L.R. 10 Eq. 641, at p. 647; *Re Gilchrist and Island*, 1886, 11 O.R. 537, at p. 539.

(*z*) *Re British Canadian Loan and Investment Co. and Ray*, 1888, 16 O.R. 15, at p. 16; cf. a series of articles and letters in 13 C.L.T. 36, 279 (Jan., Dec. 1893), 14 C.L.T. 47 (Feb. 1894), 15 C.L.T. 1, 40, 112 (Jan., Feb., April, 1895); *Clark v. Harvey*, 1888, 16 O.R. 159; *Canada Permanent Building Society v. Teeter*, 1889, 19 O.R. 156; *Barry v. Anderson*, 1891, 18 O.A.R. 247.

(*a*) *Re British Canadian Loan and Investment Co. and Ray* *supra*; *Uren v. Confederation Life Association*, 1917, 40 O.L.R. 536.

(*b*) A special form of power of sale without notice is suggested in §333, *supra*. As to the care to be exercised in making alterations in the short form of power of sale, see §335.

(*c*) *Hetherington v. Sinclair*, 1915, 34 O.L.R. 61, 23 D.L.R. 630; following *Pearson v. Benson*, 1860, 28 Beav. 598; cf. however, *Hamilton v. York and Baldry*, 1913, 13 D.L.R. 3 (Alta.).

of the grantor's equitable rights. It has also been held that where land is granted by deed absolute in form upon an oral trust, not to hold the property as security, but to sell the property and out of the proceeds to pay the money due to the trustee and other persons with a resulting trust as to any surplus, the trustee may sell without notice to the person equitably entitled, and such sale would be valid even if the trust for sale were set out in the deed (*d*).

§339. *Form and service of notice.*

It depends upon the terms of the power of sale whether notice of exercising the power need be given or by whom or to whom, when and in what manner notice need be given (*e*).

If notice is required to be given, but the length of notice is not specified, it would seem that reasonable notice would be such as to give the mortgagor sufficient time in which to get the money (*f*).

The intention to sell should be distinctly stated in the notice. Where the notice stated only that unless payment should be made proceedings would be instituted to obtain possession, it was held that the notice was insufficient to support a sale (*g*).

It is also provided in the Mortgages Act, R.S.O. 1914, c. 112, s. 28, as follows:

28. A notice of exercising a power of sale shall state the amounts claimed to be due for principal, interest and costs respectively.

In the case of a sale under the statutory power of sale

(*d*) *Oland v. McNeil*, 1901, 32 Can. S.C.R. 23.

(*e*) See statutory implied power of sale (§332); contractual power of sale (§333); statutory short form of power of sale and qualifications thereof (§334, 335); who may exercise the power (§336); when the power may be exercised (§337); power of sale without notice (§338).

(*f*) *Cf. Moore v. Shelley*, 1853, 8 App. Cas. 265, at p. 263.

(*g*) *Bartlett v. Jull*, 1880, 28 Gr. 40.

implied in certain circumstances under the Mortgages Act, a specified form of notice is prescribed (*b*). It is a frequent practice to use this form in other cases, although it is not necessary to do so.

It is not essential that any signature should appear at the foot or end of the notice, but it is essential that the identity of the person giving the notice should appear in the notice (*i*), and that the notice should be a complete, and not an obviously incomplete document. Where a notice did not show that it was given by or on behalf of the mortgagee and was not signed, it was held invalid (*j*). A notice given in the name of the mortgagee and signed by his solicitor is sufficient (*k*).

A notice should be addressed to the person to be served, but the fact that it is not so addressed is not a fatal defect if it is served upon such person (*l*). The service of notice upon an agent of the mortgagor was held to be effective where the notice was in fact forwarded by the agent to the mortgagor and was received in due time by the latter who made no objection to the notice or the service (*m*).

The mode of giving notice prescribed by the power of sale should be strictly observed. In a case where the power required that notice should be given to the mortgagor, his heirs, executors or administrators, and notice was served upon the widow and administratrix of the mortgagor addressed to her as widow, and not upon the heir, a child three years of age, it was held that the notice of sale should have been served

(*b*) See §332, *supra*.

(*i*) It has been held, however, that an unsigned notice accompanied by a signed letter is sufficient. *Lockhart v. Yorkshire Guarantee and Securities Corporation*, 1908, 14 B.C.R. 28.

(*j*) *Ansell v. Bradley*, 1916, 37 O.L.R. 142, 31 D.L.R. 297.

(*k*) *Fenwick v. Whitwam*, 1901, 1 O.L.R. 24.

(*l*) *Ansell v. Bradley*, *supra*; *Doe dem. Matthewson v. Wright*, 1801, 4 Esp. 5.

(*m*) *Fenwick v. Whitwam*, *supra*.

upon both the heir and the administratrix, the disjunctive conjunction referring only to the personal representatives and not to them and the heirs (*n*).

Spragge, C., said (*o*):

"I find no case in which it has been held, or in which it has been contended, that where, by the terms of a contract, notice is required to be given, notice will be dispensed with because the person to whom it is to be given is not of capacity to understand it It does not follow, from the heir in this case being so young, that the placing of a proper notice in his hands, directed to him as heir-at-law, would necessarily have been an idle form. It might have drawn the attention of the child's mother, who was, I apprehend, his guardian in socage, to his rights, and to her duties in that relation; but whether practically useful or not it was a something without the doing of which the mortgagee had not the power to sell."

The short form of power of sale contained in schedule B to the former Short Forms of Mortgages Act (*p*) provided for notice to be given to the mortgagor, his heirs or assigns, but the form referred to in the present statute (*q*) provides for service on the mortgagor, his heirs, executors, administrators or assigns. Under the earlier form of power it was held that if the estate had become vested in the heirs by virtue of the Devolution of Estates Act (*r*), service upon the personal representatives was not necessary (*s*), but under the present form of power it would seem advisable if not necessary to serve both the heirs and the personal representatives (*t*).

(*n*) *Bartlett v. Jull*, 1880, 28 Gr. 140.

(*o*) 28 Gr. at p. 143. In the case of the statutory implied power of sale special provision is made by the Mortgages Act for service upon an infant who succeeds to the title of a mortgagor (see §332), but this provision has no application to an express power of sale. *Re Martin and Merritt*, 1901, 3 O.L.R. 284.

(*p*) R.S.O. 1897, c. 126, superseded by 10 E. 7, c. 51.

(*q*) R.S.O. 1914, c. 117. See §334, *supra*.

(*r*) See chapter 17, *Persons entitled on Death of the Mortgagor*, §162.

(*s*) *Re Martin and Merritt*, 1901, 3 O.L.R. 284.

(*t*) Cf. *Bartlett v. Jull*, *supra*.

Clearly, so long as the estate is vested in the personal representatives, service upon them is necessary, as they are deemed in law the heirs of the mortgagor (*u*).

The wife of a mortgagor who has joined in a mortgage to bar her dower is not an "assign" of her husband, and is not, in her husband's lifetime, entitled to notice under a power of sale which requires notice to be served upon the mortgagor or his assigns (*v*).

A sale under a power requiring notice to be given will not be valid if there is no person in existence to whom notice can be given: if, therefore, the terms of the power require that notice shall be served upon the personal representative of the mortgagor, the power will not be exercisable until one is appointed (*w*).

The purchaser of the equity of redemption is entitled to notice, and where the equity of redemption has been sold in several parcels to different persons who are entitled to redeem in respect of their own parcels, these different persons are entitled to notice (*x*).

If the power requires notice to be given to the mortgagor or his assigns, and there is a second mortgage made by the mortgagor, it is not sufficient to give notice to the mortgagor alone, but the second mortgagee also is entitled to notice, and may recover damages from the first mortgagee if he exercises the power of sale without giving such notice. The words are to be read as meaning "the mortgagor *and* his assigns" (*y*).

(*u*) See s. 7 of the Devolution of Estates Act, quoted in chapter 13, *Persons entitled on Death of the Mortgagor*, §123.

(*v*) *Re Martin and Merritt, supra*; *Girardot v. Curry*, 1916, 38 O.L.R. 350, 33 D.L.R. 272.

(*w*) *Parkinson v. Hanbury*, 1867, 1 Dr. & Sm. 143, 2 DeG. J. & S. 152, L.R. 2 H.L. 1, 18 R.C. 411.

(*x*) *Buckley v. Wilson*, 1861, 8 Gr. 566.

(*y*) *Hoole v. Smith*, 1881, 17 Ch.D. 434.

The plaintiff had entered into an agreement in writing with the second mortgagee and the mortgagor whereby he was entitled to enforce a transfer of all their interest to him. The first mortgagee, with express notice of this agreement, made a sale under the power in his mortgage, without giving notice to the plaintiff. It was held that the plaintiff was entitled to notice and the sale was set aside (z).

If the owner of lands makes a lease and subsequently mortgages the lands the mortgagee is in the position of assignee of the reversion on the lease and takes the lands subject to the lease. If, however, the mortgagor after making the mortgage leases the lands, the lessee is a purchaser of the equity of redemption *pro tanto* and is entitled to redeem. He is therefore entitled to notice of sale (a).

Execution creditors of the mortgagor, whose writs are in the sheriff's hands at the time of giving notice of sale to the mortgagor, are assigns and as such are entitled to notice (b). Execution creditors of the mortgagee are not entitled to notice of sale (c). They have, however, such an interest in the due exercise of the power that the court will grant them relief against a mortgagee exercising the power to their disadvantage (d).

Where mortgagees sold the mortgaged premises without notice to a person who was surety for a part of the debt, it was held that they were liable as between themselves and the surety for the full value of the property (e).

(z) *Stewart v. Rowson*, 1892, 22 O.R. 533.

(a) *Tarn v. Turner*, 1888, 39 Ch.D. 456; see *Anderson v. Stevenson*, 1888, 15 O.R. 563; *Martin v. Miles*, 1883, 5 O.R. 404; *Collins v. Cunningham*, *Cunningham v. Drysdale*, 1892, 21 Can. S.C.R. 139 at p. 149.

(b) *Re Abbott and Medcalf*, 1891, 20 O.R. 299.

(c) But see *Sanderson v. Ince*, 1859, 7 Gr. 383.

(d) *Commercial Bank v. Watson*, 1859, 5 U.C.L.J. 163.

(e) *Martin v. Hall*, 1878, 25 Gr. 471.

If the person to be served is a lunatic service upon him is nevertheless valid; it is unnecessary to provide that the notice shall be valid in such case (*f*).

If a trustee has not sufficient funds in his hands to enable him to redeem he will not properly represent his *cestui que trust*. In that case the *cestui que trust* should be served with notice for he is of course interested in the equity of redemption and may be in a position to redeem (*g*).

Notice need be given only to the mortgagor or those claiming under him. If there is a mortgage paramount to the mortgage under which the power of sale is being exercised it is not necessary to notify the paramount mortgagee, but the sale will be subject to his claim. Where a mortgagor took lands by a conveyance which was void as against creditors, and then conveyed to the mortgagee without notice, and the conveyance to the mortgagor was subsequently set aside as against creditors, it was held that the mortgagee need not give notice to the creditors of the mortgagor, the mortgage being paramount to their title, even although the creditors might have a right to redeem and to require an account of the proceeds of the sale (*h*).

The mortgagor or his assigns may waive the right to notice. Such waiver may be either express or implied from conduct; but mere delay or inaction is not waiver (*i*). A mortgagor cannot waive notice as against an assignee from him of the equity of redemption (*j*).

(*f*) *Tracy v. Lawrence*, 1854, 2 Dr. 403. A notice of dissolution of partnership properly given under the articles is good, though the partner served be insane; *Robertson v. Lockie*, 1846, 15 Sim. 285.

(*g*) See *Goldsmid v. Stonehewer*, 1852, 9 Hare App. xxxviii; *Mills v. Jennings*, 1880, 13 Ch.D. 639, S.C. 6 App. Cas. 693.

(*h*) *Major v. Ward*, 1847, 5 Hare 598.

(*i*) *Selwyn v. Garfit*, 1888, 38 Ch.D. 273; *In re Thompson and Holt*, 1890, 44 Ch.D. 492.

(*j*) *Forster v. Hoggart*, 1850, 15 Q.B. 155; *Selwyn v. Garfit*, 1888, 38 Ch.D. 273.

Where the power of sale provided that the notice should be given to the mortgagor, his heirs, executors, administrators or assigns, or left at his or their usual or last known place of abode, and the notice was fixed to the door of the last known place of abode, this was held to be valid service as against the creditors of the mortgagor (*k*).

According to the extended power of sale which is the equivalent of the short form of power of sale under the Short Forms of Mortgages Act (*l*) notice of exercising the power of sale must be given to the mortgagor, his heirs, executors, administrators or assigns either personally or at his or their usual or last place of residence within the province. It has been held that the statute permits substitutional service at the usual place of residence of the mortgagor although he may be within the province (*m*). Three modes of service are permitted by the statute:—(1) personal service on the mortgagor; (2) service by leaving the notice at the mortgagor's usual place of residence within the province; and (3) service by leaving the notice at the mortgagor's last place of residence within the province (*n*).

A difficulty may arise where personal service cannot be effected and the mortgagor has no usual place of residence within the province, and where further the mortgagor's last place of residence within the province is not known. To meet this difficulty, a special clause may be inserted providing for alternative modes of service (*o*).

It is provided by the Registry Act, R.S.O. 1914, c. 124, s. 58, as follows:

(*k*) *Major v. Ward*, 1847, 5 Hare 598

(*l*) For the text of the short form and the corresponding extended form, see §334, *supra*.

(*m*) *O'Donohoe v. Whitty*, 1882, 2 O.R. 424, referring to *Major v. Ward*, 1847, 5 Hare 598; affirmed in Court of Appeal on another ground: 20 C.L.J. 146.

(*n*) *Per Boyd, C.*, *O'Donohoe v. Whitty*, 1882, 2 O.R. 424, at p. 430.

(*o*) See special form of power suggested in §333, *supra*.

538. - (1) A notice of sale of land under the provisions of *The Mortgage Act*, and a notice of exercising the power of sale contained in any mortgage, and the affidavit or declaration of service thereof may be registered, and the same shall be registered in the same manner as an instrument affecting land, but it shall not be necessary to record the notice or the affidavit or declaration of service attached thereto in the registry book.

(2) The affidavit or declaration shall be made by the person who served the notice, and shall prove the time, place and manner of such service, and that the copy delivered to the registrar is a true copy of the notice served.

(3) A copy of the registered notice and affidavit or declaration certified under the hand and seal of office of the registrar shall be *prima facie* evidence of the service of the notice as stated in the affidavit or declaration (p).

(4) Where the person who served the notice is dead or out of Ontario, or where it is proved to the satisfaction of a Judge of a County or District Court, that the place of abode of such person is unknown, or that he is incapable of making an affidavit or declaration of service, or where service of such notice has been or is duly admitted any person who is or who claims to be interested in the registration of the notice may make proof before the judge of the service of the notice, and upon a certificate of such judge endorsed on or attached to the notice and signed by him to the effect that from the proof adduced by the person producing the proof, naming him, he is satisfied of the due service of the notice, the registrar shall register the notice and certify (p).

(5) Where the notice cannot be produced to be registered, any person who is or who claims to be interested in the registration of the notice may make proof before the judge of the service thereof and of the inability to produce the same, and upon depositing a certificate of such judge to the effect that from the proof adduced by the person producing the proof, naming him, he is satisfied of the due service of the notice upon the person served, naming him and that the same cannot be produced the registrar shall register the certificate, and a copy of such certificate under the hand and seal of the registrar shall be *prima facie* evidence of the facts therein stated (q).

(6) Where a notice of sale or a certificate of a judge under sub-sections 4 or 5 has been registered, the same may be registered in any other registry office by depositing a copy thereof, certified in the manner provided by section 44.

(p) Cf. *Re Winberg and Kettle*, 1917, 12 O.W.N. 327.

(q) See *Girardot v. Curry*, 1917, 38 O.L.R. 350, 33 D.L.R. 272.

§340. *Concurrent proceedings by the mortgagee.*

A mortgagee may combine in one action claims for foreclosure or sale, for possession of the mortgaged land and for payment of the mortgage money (*r*).

A mortgagee who has brought an action to recover the mortgage money and for possession of the mortgaged land may also exercise the power of sale. There is nothing inconsistent in the two proceedings. Possession will be needed in the event of a sale being made. The amount realized from the sale must be applied towards payment of the mortgage debt. If enough is realized from the sale, the claim upon the covenant to pay will be satisfied; if the proceeds of the sale are insufficient, the personal judgment for the unsatisfied amount will be needed (*s*). If, however, a demand or notice is made or given within the meaning of s. 29 of the Mortgages Act, mentioned below, further proceedings in the action will be stayed until after the lapse of the time at or after which, according to such demand or notice, payment of the money is to be made or the power of sale is to be exercised.

On the other hand, a mortgagee cannot, after the usual order nisi for foreclosure and before the foreclosure is made absolute, exercise his power of sale without the leave of the court, because a sale would prejudice the rights given to the mortgagor by the court under the direction in the judgment for reconveyance on payment, but the power of sale is suspended only, not extinguished, and a purchaser in good faith without notice may get a good title (*t*).

A company being in liquidation, the mortgagees went into possession prior to the issue of the winding-up order. On an application to restrain the mortgagees from selling under their

(*r*) See chapter 22, *Action for Possession*, §211.

(*s*) *Shields v. Shields*, 1918, 43 O.L.R. 117.

(*t*) *Stevens v. Theatres*, [1903] 1 Ch. 857; cf. *DeBeek v. Canada Permanent Loan and Savings Co.*, 1907, 12 B.C.R. 409.

security, objection was taken that the attendance of the mortgagees on the application and the approving of the winding-up order was such a taking part in the winding-up as gave the court jurisdiction to restrain them. This objection being overruled, the liquidator sought to restrain the mortgagees from selling without the sanction of the court on the ground that such sale would be a "proceeding against the company" under s. 22 of the Winding-up Act, R.S.C. 1906, c. 144. It was held that the mortgagees were proceeding rightfully (*u*).

It is also provided by the Mortgages Act, R.S.O. 1914, c. 112, ss. 29 and 30, as follows:

29.—(1) Where, pursuant to any condition or proviso contained in a mortgage, there has been made or given a demand or notice either requiring payment of the money secured by such mortgage, or any part thereof, or declaring an intention to proceed under and exercise the power of sale therein contained, no further proceeding and no action either to enforce such mortgage, or with respect to any clause, covenant or provision therein contained, or to the mortgaged property or any part thereof, shall, until after the lapse of the time at or after which, according to such demand or notice, payment of the money is to be made or the power of sale is to be exercised or proceeded under, be commenced or taken unless and until an order permitting the same has been obtained from a Judge of the County or District Court of the county or district in which the mortgaged property or any part thereof is situate, or from a Judge of the Supreme Court.

(2) The order may be obtained *ex parte* upon such proof as satisfies the Judge that it is reasonable and equitable that the proposed action or proceeding should be permitted.

(3) This section shall not apply to proceedings to stay waste or other injury to the mortgaged property.

30. (1) Where such demand or notice requires payment of all money secured by or under a mortgage the person making such demand or giving such notice shall be bound to accept and receive payment of the same if made as required by the terms of such demand or notice.

(2) If there is a dispute as to the costs payable by the person by or on whose behalf such payment is either made or tendered such costs shall, on three clear days' notice to such person by the person claiming the same, be taxed and ascertained by the Clerk of the

(*u*) *Re British Columbia Tie and Timber Co.*, 1908, 14 B.C.R. 81.

County or District Court, or by the Local Master of the county or district in which the mortgaged property or any part thereof is situated.

(3) If within ten days after the costs have been so taxed and ascertained, payment of such money and costs is duly made or tendered to the person entitled thereto, or to his solicitor or agent, the same shall be deemed a compliance with such demand or notice.

(4) A mortgagee's costs of and incidental to the exercise of a power of sale, whether under this Part or otherwise, may, without an order, be taxed by one of the taxing officers of the Supreme Court at Toronto or by a local master having jurisdiction in the county or district in which the mortgaged property or any part of it is situated at the instance of any person interested.

Where a notice of exercising the power of sale was dated 1st of May and a writ claiming payment under the covenant issued on 3rd of May, and both notice and writ were served on 3rd of May, it was held that the issue of the writ was a further proceeding within the meaning of the statute and an order was made setting aside the service of the writ and staying all proceedings in the action (*r*).

An action was commenced to enforce payment under the covenant and notice of motion for summary judgment was given. Before the return of the motion the mortgagee served notice of exercising the power of sale unless the mortgage moneys should be paid within thirty days, but subsequently gave notice of abandonment of the notice of sale. It was held that the mortgagee was bound by the notice of sale and the proceedings in the action were stayed for the thirty days named therein (*r*).

An advertisement for sale is a proceeding within the meaning of the words "no further proceeding" and where a mortgagee served a notice stating that unless payment should be made within a month from service the mortgagee would proceed to sell, an injunction was granted restraining the mort-

(r) *Perry v. Perry*, 1884, 10 O.P.R.

(r) *Lyon v. Ryerson*, 1897, 17 O.P.R. 4.

gaggee from publishing an advertisement of sale until the expiration of the month.

Proceedings will be stayed only "where there is a condition or proviso contained in a mortgage forbidding made or given a demand or notice either requiring payment of the moneys secured by the mortgage or compelling the mortgagee or declaring an intention to proceed under and exercise the power of sale"; and the statute does not apply where the power of sale is exercisable without any such condition.

§341. *Conduct of the sale.*

A mortgagee exercising a power of sale is not a trustee of the mortgagor except as regards the surplus of the purchase money arising from the sale after the mortgage debt is satisfied. This is so whether the mortgage is in the ordinary form or by way of trust for sale (1).

"A mortgagee having a power of sale cannot, as between himself and the mortgagor, exercise it in a manner merely arbitrary, but is as between them bound to exercise some discretion; not to throw away the property, but to act in a prudent and business-like manner, with a view to obtain as large a price as may fairly and reasonably, with due diligence and attention, be under the circumstances obtainable" (a).

A mortgagee with a power of sale, though often called a trustee, is in a very different position from a trustee for sale. A mortgagee is under no obligations to the mortgagor, but he has rights of his own which he is entitled to exercise adversely to the mortgagor. A trustee for sale has no business to place himself in such a position as to give

(1) *Smith v. Brown*, 1890, 20 O.R. 165. The original statute 17 V. c. 16, s. 1 provided that no further proceedings *at law or in equity* should be taken. The words in italics were omitted from R.S.O. 1887, c. 10, s. 30.

(a) *Canada Permanent Building Society v. Teeter*, 1889, 19 O.R. 156.

(2) *Kirkwood v. Thompson*, 1865, 2 H. & M. 392; *Locking v. Parker*, 1878, L.R. 8 Ch. 30; *In re Alison*, *Johnson v. Mounsey*, 1879, 11 Ch.D. 284.

(a) *Matthie v. Edwards*, 1846, 2 Coll. 465, 10 Jur. 347 S.C. on appeal *sub nom.* *Jones v. Matthie* 11 Jur. 504.

to a conflict of interest and duty. But every mortgage confers upon the mortgagee the right to realize his security and to find a purchaser if he can, and if in exercise of his power, he acts *bona fide* and takes reasonable precautions to obtain a proper price, the mortgagee is not in breach, even although more might have been obtained for the property if the sale had been postponed" (b).

A mortgagee is not a trustee of a power of sale for the mortgagor at all; his right is to look after himself first. But he is not at liberty to look after his own interest alone, and it is not right, or proper, or legal for him, either fraudulently, or wilfully, or recklessly, to sacrifice the property of the mortgagor; that is all" (c).

If a mortgagee exercises the power of sale in good faith

for the purpose of realizing his mortgage debt, without collusion or collusion with the purchaser, the court will not interfere, even though the sale be very disadvantageous, unless

the price is so low as in itself to be evidence of fraud (d).

If, however, he acts "fraudently, or wilfully, or recklessly" (d') or if by reason of his "wilful negligence and default" the land is sold at an undervalue (d'), he will be chargeable with the full value of the land. The effect of the decisions is "to displace the test of a prudent man dealing with his own property, in favour of a somewhat lesser degree of responsibility" (d').

Under the extended form of power of sale provided by the Short Forms of Mortgages Act (e) it is stipulated that the

(b) *Farrar v. Farrars*, 1888, 40 Ch D. 395, at p. 419. See also *Cholmondeley v. Clinton*, 1829, 2 J. & W. 1 at p. 182; *Davey v. Durrant*, 1857, 1 De G. & J. 100.

(c) *Kennedy v. De Trafford*, [1896] 1 Ch. 762, at p. 772, affirmed [1897] A.C. 189.

(d) *Warner v. Jacob*, 1882, 20 Ch D. 229, 18 R.C. 452; *Haddington Island Quarry Co. v. Huson*, [1911] A.C. 722; *Kaiserhof Hotel Co. v. Zuber*, 1912, 45 Can. S.C.R. 651, 9 D.L.R. 877, affirming 25 O.L.R. 194.

(d') *Kennedy v. De Trafford*, *supra*; *British Columbia Land and Investment Agency v. Iskutaka*, 1911, 45 Can. S.C.R. 302, at pp. 316, 317.

(e) *National Bank of Australasia v. United Hand in Hand, etc. Co.* [1891] A.C. 100, at p. 111; *Wilson v. Taylor*, 1912, 4 O.W.R. 717, 1 O.W.R. 36.

(f) *Wilson v. Taylor*, *supra*.

(g) See § 334, *supra*.

mortgagee shall not be responsible for any loss which may arise by reason of any sale "unless the same shall happen by reason of his . . . wilful neglect or default."

A sale under power of sale may be set aside if the conduct of the mortgagee is oppressive. This relief was granted in a case in which the mortgagee exercised the power after a tender of principal and interest (the costs not having been ascertained) and the purchaser was aware of the facts (*l*). A solicitor took from his client a mortgage for £200 for costs the mortgage being a valid security for about £30 only, as not more than that amount of costs had been incurred at the time of taking the mortgage. The purchaser under the power of sale in the mortgage became aware before completing the purchase of the vexatious and oppressive user of the power. It was held under these circumstances that the purchaser could not acquire a good title to the lands and that he was entitled to recover back the deposit paid by him (*g*).

"The extended form of power of sale above mentioned provides that the person exercising the power may sell "by public auction or private contract, or partly by public auction and partly by private contract, as to him shall seem meet," and a sale under the power of sale conferred by the Mortgages Act (*h*) may be "by public auction or private contract."

"To hold that the mortgage was bound in the first instance to put up the property for sale by auction would be to limit, cut down the power given by the deed, which expressly authorizes a sale by public auction or private contract; and certainly I am not prepared to hold that a mortgagee is not justified in accepting a fair offer for the purchase of the mortgaged property until he has advertised the property for sale." (*i*)

(*l*) *Jenkins v. Jones*, 1860, 2 Giff. 99.

(*g*) *Locking v. Halsted*, 1888, 16 O.R. 72.

(*h*) *See* *supra*, *note* *g*.

(*i*) *Deane v. Pittman*, 1857, 1 De G. & J. 177, 45 E.R. 510; 1860, 6 M.R. 263.

Where the terms of the power prescribe that the sale shall be by public auction only, a sale by private contract will not be valid (7).

It would be inadvisable for the mortgagee to depart from the well established practice of duly advertising the property for sale; the advertisement is an evidence of the mortgagee's good faith and desire to obtain the best possible price. Where the mortgagee offered the property for sale without advertisement and sold it for one-half its cash value, the price received being near the amount due to himself the sale was set aside (8).

"It is the ordinary course before a sale by auction to give every publicity to it by advertisement in the newspapers and by handbills; I should almost have said it is the invariable practice. I think the sale in question is the only exception that has ever come under my notice. It is the course of this court and the practice of everyone who desires to get the best price that can be gotten for the property to be sold." (9)

Where the mortgagees selling under power of sale inserted no advertisement in a local newspaper but only in a newspaper published in a town over seventy miles distant, and the advertisement made no mention of any improvements, although there were valuable improvements on the land, it was held that the mortgagees had so negligently and carelessly conducted the sale that the property was sacrificed, and that they were liable for the difference between the amount realized at the sale and the amount which the evidence shewed the property would have brought if it had been properly advertised (10).

⁽⁷⁾ *Washeld v. Hodges*, 1863, 33 Beav. 90.

⁽⁸⁾ *Wright v. Furlong*, 1866, 12 Gr. 303; see *Richmond v. Evans*, 56 L. R. Gr. 508; *Thompson v. Holman*, 1880, 28 Gr. 35; *Aldrich v. Canada Permanent Loan and Savings Co.*, 1896, 27 O.R. 548; affirmed 1 O.R. 19.

⁽⁹⁾ *Thompson v. Furlong*, 1861, 8 Gr. 508.

⁽¹⁰⁾ *Thompson v. Furlong*, 1861, 8 Gr. 508; *Richmond v. Evans*, 56 L. R. Gr. 508; *Thompson v. Holman*, 1880, 28 Gr. 35; *Aldrich v. Canada Permanent Loan and Savings Co.*, 1896, 27 O.R. 548.

The usual practice is to advertise the sale once a week for three or four consecutive weeks and to fix as the date for sale a day one or two weeks after the last publication of the advertisement. In some cases it will be advisable to advertise in a newspaper published in the neighborhood of the property to be sold; in other cases, as for instance where the property is a manufactory, the advertisement might be published to more advantage in one of the newspapers of the largest city in the province. It is usual to post up or distribute about one hundred posters; but it would seem that even fifty will be sufficient (n).

The extended form of the power of sale above mentioned provides that the person exercising the power of sale may sell and absolutely dispose of the said lands, tenements, hereditaments and premises hereby conveyed or mentioned, or intended so to be, *or any part or parts thereof*, with the appurtenances, and the implied power of sale given by the Mortgages Act provides for the sale *of the whole or any part* of the property. Such a power of sale does not authorize the sale of timber standing upon the mortgaged lands without the land (o), nor may the mortgagee exercising his power of sale sell trade machinery apart from the mortgaged buildings (p). The principle may be stated thus: The land may be divided vertically and parcels of it sold; but it may not be divided horizontally (q).

"They [the trustees] might sell different parcels of the estate at different times, and make separate conveyances of each parcel so sold: that is the extent of their authority. They cannot sell *part* of

Savings Co., *supra*, and National Bank of Australasia v. United Hand-in-Hand etc. Co., 1879, 4 App. Cas. 351

(n) *Thompson v. Holman*, 1880, 28 Gr. 35

(o) *Stewart v. Rowsom*, 1892, 22 O.R. 533

(p) *In re Yates*, *Batchelor v. Yates*, 1888, 38 Ch.D. 112. See *Ex parte Barclay*, *In re Joyce*, 1871, L.R. 9 Ch. 576; *Ex parte Brown*, *In re Reed*, 1878, 9 Ch.D. 385

(q) *Stewart v. Rowsom*, *supra*.

a parcel. They must not sell the land without the timber, or the timber without the land on which it grows" (r).

The mortgagee is bound to take the proper precautions to ensure an advantageous sale, and if the circumstances so required he must sell the property in parcels and not in a block. The mortgagees in a mortgage containing two parcels of land, a farm with buildings, and some village lots with stores thereon about three-quarters of a mile distant from the farm, sold the property *en bloc*, under the power of sale in the mortgage, for a much smaller sum, as shown by the evidence, than would have been realized had the parcels been sold separately, and it was held that the mortgagees had not acted with due prudence and discretion, and that they were liable to the mortgagors for the amount that might have been realized (s).

It has been held that a trustee-mortgagee has power to release part of the property on receipt of the whole of the proceeds of such part. "It was stated in argument that the question had never been raised before, and we can appreciate the reason. For at least a century a mortgagee has usually been empowered, as he now is by statute, to sell the mortgaged property 'either together or in lots.' There is nothing in the decision to justify an improvident sale or release" (t).

The extended statutory form of power of sale above mentioned authorizes the mortgagee to "sell and absolutely dispose of" the mortgaged lands, and it has been held that the mortgagee may exercise the power by way of exchange for other land instead of by sale for money (u).

(r) *Cholmeley v. Paxton*, 1825, 3 Bing. 207, at p. 213.

(s) *Aldrich v. Canada Permanent Loan and Savings Co.*, *supra*; cf. *Wilson v. Taylor*, 1912, 4 O.W.N. 253, 7 D.L.R. 317, 23 O.W.R. 359; *Uren v. Confederation Life Association*, 1917, 40 O.L.R. 536.

(t) Note in 31 L.Q.R. 139 (April, 1915) on *In re Morrell and Chapman's Contract*, [1915] 1 Ch. 162.

(u) *Smith v. Spears*, 1892, 22 O.R. 286; cf. *Abel v. Heathcote*, 1793, 4 Bro. C.C. 277, where it was held that the word "sell" justifies partition; *In re Frith and Osborne*, 1876, 3 Ch.D. 618, where it was

A mortgagee selling under power of sale may make special conditions provided that they are not unreasonably depreciatory. The following was said with reference to a condition that the vendor might rescind if unable or unwilling to answer objections to title:

"This, however, must be borne in mind, that though of course the object of the mortgagor is to realize the largest amount that can be got, yet it does not follow that conditions of sale, the effect of which would be to obtain the largest possible amount at the sale, are always the best for the mortgagor; for they may be such that after selling at a good price immense expense may afterwards occur, and after all you may fail in enforcing the contract, which would be to the detriment of the mortgagor. It does not follow, therefore, that because the conditions do to some extent tend to depreciate the price that will be offered at the sale, they are conditions which are really to the detriment of the mortgagor. If such a condition as this were to the detriment of a mortgagor, it would be equally so when the absolute owner is selling; and yet we find that it is in practice a very ordinary and reasonable condition for an absolute owner to introduce in his conditions, and one that without saying all conveyancers, but at any rate many leading conveyancers, consider extremely proper to be introduced when a mortgagee is selling under a power. The strong impression upon my mind is this, that the question is not simply whether such a condition may tend to diminish the number of buyers or the sum which any bidder may be disposed to give; but whether it would tend to the detriment of the mortgagor or of an absolute owner, or be prudent in an absolute owner. If it would be prudent in an absolute owner it is not imprudent as affecting a mortgagor" (r).

Where a condition of sale provided that the abstract should commence with a certain deed fifteen years old, that all recitals in deeds fifteen years old should be taken as conclusive evidence of the facts recited, and that the purchaser should not require evidence as to the identity of the parcels,

held that a power of exchange authorizes partition; see, however, *Winters v. Kinstry*, 1902, 14 M.R. 294, where *Smith v. Spears* is explained and distinguished.

(r) *Falkner v. Equitable Reversionary Society*, 1858, 4 Drew. 352

it was held that the condition was proper (*uv*). A condition by trustees that the title should commence with the deed under which they took the trust property was held to be improper (*v*).

On a sale of mortgaged lands it is usual to require the purchaser to make a deposit of 10% of the purchase price, that being the amount required on a judicial sale by the standing conditions of the court. The mortgagee has, however, the right to fix what sum he chooses as being the reasonable deposit (*y*). An agent of the mortgagee, selling under a power of sale is not negligent in accepting a cheque in payment of the deposit; and the mortgagee will not be deprived of the costs of a sale which is rendered abortive by such acceptance (*z*).

A mortgagee selling under a power of sale may give time for payment of part of the purchase money without the consent of the mortgagor, if he accounts for the purchase money as cash at the time of the sale, but he cannot charge the mortgagor with a discount paid for cashing the mortgage or with costs thereby incurred.

The reason is that he can deal as he pleases about giving time on his own debt, and if as to any surplus he accounts forthwith to the mortgagor and pays him cash, that removes any objection on the part of the latter that the sale should have been a cash sale (*aa*).

Where a mortgagee has sold the lands under a power of sale he is under obligation to carry out the sale; he cannot without sufficient reason treat the sale as a nullity and fall back on the mortgage to enforce payment in other ways, as if the exercise of the power was a mere matter of form (*b*).

(*u*) *Kershaw v. Kalow*, 1855, 1 Jur. N.S. 974.

(*v*) *Dance v. Goldingham*, 1873, L.R. 8 Ch. 902.

(*w*) *Farrer v. Lacy, Hartland & Co.*, 1885, 31 Ch.D. 41.

(*z*) *Farrer v. Lacy, Hartland & Co.*, *supra*.

(*a*) *Bailey v. O'Connor*, 1884, 5 O.R. 731; *Davey v. Durran*, 1857, 1 DeG. & J. 535; *Thurlow v. Mackeson*, 1868, L.R. 4 Q.B.

(*b*) *Patterson v. Tanner*, 1892, 22 O.R. 364.

A mortgagee's power of sale is not extinguished by reason of an ineffectual attempt to exercise it (c).

§342. *Who may purchase.*

A mortgagee with power of sale, except where in a judicial sale he obtains the leave of the court to bid, cannot sell to himself either alone or with others; nor can he sell to a trustee for himself.

"A sale by a person to himself is not a sale at all, and a power of sale does not authorize the donee of the power to take the property subject to it at a price fixed by himself, even although such price be the full value of the property. Such a transaction is not an exercise of the power, and the interposition of a trustee, although it gets over the difficulty so far as form is concerned, does not affect the substance of the transaction." (d)

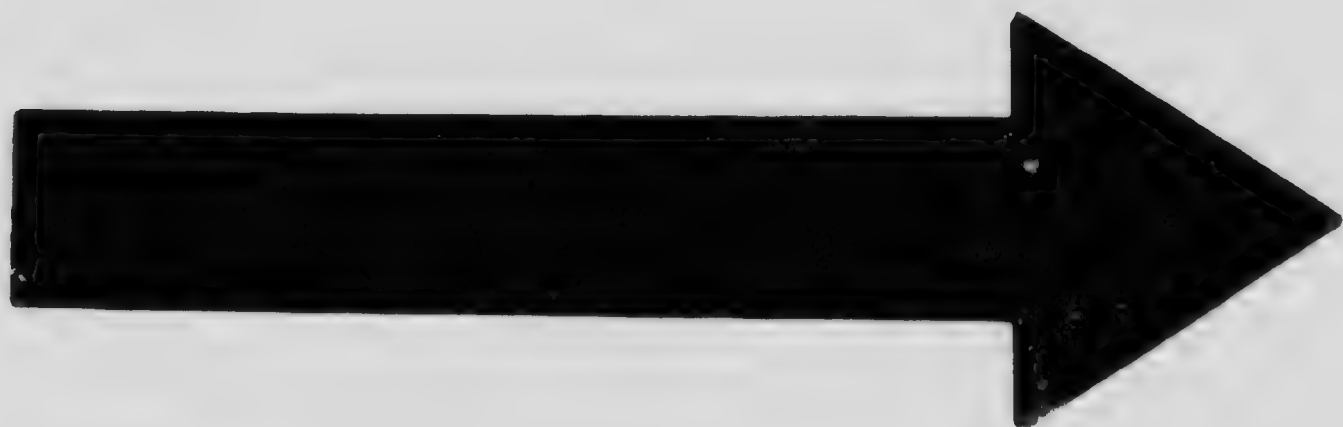
A mortgagee sold the mortgaged premises under his power of sale ostensibly to a third person but in reality to himself. Shortly afterwards he sold a portion of the lands for a sum exceeding the amount due on the mortgage, and he also received rents for the remaining portion. It was held that the sale by the mortgagee to himself was abortive, and that he was a mortgagee in possession, and should account to the mortgagor for the surplus received from the second sale and for the rents, together with interest on both amounts; and the mortgagee was ordered to pay the costs of the action (e).

Where the first mortgagee after making preliminary arrangements to ensure an advantageous sale of the mortgaged

(c) *Henderson v. Astwood*, [1894] A.C. 150.

(d) *Farrar v. Farrars*, 1888, 40 Ch.D. 395, at p. 409. See *Downes v. Grazebrook*, 1817, 3 Mer. 200; *Robertson v. Norris*, 1858, 1 Giff. 421; *National Bank of Australasia v. United Hand-in-Hand, etc., Co.*, 1879, 4 App. Cas. 391; *In re Bloye's Trust*, 1849, 1 Mac. & G. 488; *Henderson v. Astwood*, [1894] A.C. 150; *Hodson v. Deans*, [1903] 2 Ch. 647.

(e) *Mitchell v. Kinnear*, 1897, 1 N.B. Eq. 427; *Ellis v. Della-bough*, 1869, 15 Gr. 583.



property bought the second mortgagee's security at a discount without informing him of such arrangements, the court refused to set aside the sale (*f*).

Where a person has acted as agent for the mortgagee, for example, in negotiating the loan, receiving the interest for the mortgagee, or conducting the sale, he cannot purchase from the mortgagee under the power of sale (*g*). The solicitor for a mortgagee cannot purchase even although the proceedings for sale were not taken in his name, and it was not shown that any loss had occurred by reason of his being the purchaser (*h*).

A receiver appointed by the court cannot purchase the property of which he is receiver without the leave of the court even where the sale is made, not in the action in which he was appointed, but by a mortgagee selling with leave outside the action (*i*).

Where, under the power of sale in a mortgage, a mortgagee went through the form of making a sale of the mortgaged premises to a person who on the same day reconveyed to the mortgagee, it was held that the sale was invalid and did not extinguish the right to redeem (*j*).

A sale by a mortgagee in good faith to a corporation of which he is a shareholder is not voidable by the mortgagor, but where the mortgagee sold under the power of sale to a company of which he was a promoter and also solicitor, the

(*f*) *Dolman v. Nokes*, 1855, 22 Beav. 402.

(*g*) *Orme v. Wright*, 1839, 3 Jur. 19; *Whitecomb v. Minchin*, 1820, 5 Madd. 91; *In re Bloye's Trust*, 1849, 1 Mac. & G. 488; *Lawrance v. Galsworthy*, 1857, 3 Jur. N.S. 1049; *Martinson v. Clowes*, 1882, 21 Ch.D. 857.

(*h*) *Howard v. Harding*, 1871, 18 Gr. 181; cf. *Nutt v. Easton*, [1900] 1 Ch. 29.

(*i*) *Nugent v. Nugent*, [1908] 1 Ch. 546.

(*j*) *Carter v. Bell*, 1915, 21 B.C.R. 55, 21 D.L.R. 243.

onus was thrown upon those supporting the sale of proving that the sale was *bona fide* and not at an undervalue (*k*).

A subsequent encumbrancer, whether his mortgage is in the ordinary form or by way of trust for sale, may in the absence of fraud purchase from the first mortgagee, and the subsequent encumbrancer so purchasing will acquire as absolute a title to the lands as a stranger would (*l*), and where a second mortgagee purchases under the power of sale contained in the first mortgage, he is notwithstanding such purchase entitled to collect, by virtue of the covenant contained in the second mortgage, the principal and interest due under the second mortgage (*m*).

If the mortgagor purchases from the mortgagee selling under the power of sale, this operates only as a redemption of the first mortgage and the mortgagor cannot set up the purchase against a second mortgage made by himself before the purchase. The purchase in such case inures to the benefit of the second mortgagee (*n*).

There is no fiduciary relation between co-mortgagors, tenants in common of the mortgaged lands, and one of the several co-mortgagors may purchase the lands from the mortgagee, if the exercise of the power of sale is *bona fide*, even although the price paid by the purchaser does not exceed the exact amount due for principal, interest and costs (*o*). If, however, a purchaser from the mortgagee is in a fiduciary relation

(*k*) *Farrar v. Farrars*, 1888, 40 Ch.D. 395.

(*l*) *Parkinson v. Hanbury*, 1867, L.R. 2 H.L. 1; 2 DeG. J. & S. 450; cf. *Shaw v. Bunny*, 1865, 2 DeG. J. & S. 468; *Kirkwood v. Thompson*, 1865, 2 Hem. & M. 392; 2 DeG. J. & S. 613; *Watkins v. McKellar*, 1859, 7 Gr. 584.

(*m*) *Harron v. Yemen*, 1883, 3 O.R. 126; *Union Bank of Canada v. Bates*, 1914, 24 M.R. 619, 18 D.L.R. 269.

(*n*) *Otter v. Lord Vaux*, 1856, 2 K. & J. 650; 6 DeG. M. & G. 638; *Box v. Bridgman*, 1875, 6 O.P.R. 234.

(*o*) *Kennedy v. De Trafford*, [1896] 1 Ch. 762, affirmed, [1897] A.C. 180.

as regards the mortgagor, he will hold the property as a trustee for the mortgagor and be liable to account (p).

§343. *The conveyance and its effect.*

If the mortgage is made in pursuance of the Short Forms of Mortgages Act and contains a power of sale in the form provided by that statute (q), the mortgagee is empowered to sell and absolutely dispose of the mortgaged lands, and "to convey and assure the same when so sold unto the purchaser or purchasers thereof, his or their heirs or assigns, or as he or they shall direct and appoint."

Under s. 21 of the English Conveyancing Act, 1881, a mortgagee exercising the power of sale conferred by that statute has power by deed to convey the property sold "for such estate and interest therein as is the subject of the mortgage, freed from all estates, interests and rights to which the mortgage has priority." Under this section it has been held that an equitable mortgagee by deed who exercises the power of sale conferred by the statute cannot convey the legal estate vested in the mortgagor (r), and doubtless the same principle would apply to a sale under the statutory short form in Ontario (s).

Under s. 15 of Lord Cranworth's Act, 23 & 24 V. c. 145, a mortgagee exercising the power of sale conferred by that statute has power by deed to convey or assign to and vest in the purchaser the property sold "for all the estate and interest therein, which the person who created the charge had power to dispose of." Under this section it has been held that an equitable mortgagee by way of deed of sub-lease can

(p) Griffith v. Owen, [1907] 1 Ch. 195, applying the principles of Keech v. Sandford, 1726, Sel. Cas. in Ch. 61, 2 W. & T. L.C. Eq. 706; cf. In re Biss, Biss v. Biss [1903] 2 Ch. 40.

(q) See §334, *supra*.

(r) In re Hodson and Howes' Contract, 1887, 35 Ch.D. 668.

(s) See also Burton v. Dougall, 1899, 30 O.R. 543.

convey the whole of the original term (*t*), and that an equitable mortgagee in fee by deed can convey the legal estate (*u*). The principle of these decisions would doubtless apply in Ontario to a sale under the implied statutory power contained in the Mortgages Act (*v*). It is provided by s. 24 of the last mentioned statute that the person exercising the power of sale shall have power to convey or assign to and vest in the purchaser the property sold, "for all the estate and interest therein of the mortgagor and of which he had power to dispose."

A deed under power of sale should recite the power, the default and the service of notice, if any, of exercising the power but it is not essential that the deed should purport to be made in exercise of the power. There must be the intention to sell under the power or to pass the property subject to the power, but the intention may be collected from other circumstances, or may be presumed. Where after a decree and final order of foreclosure, which proved to be invalid, the mortgagees sold the lands, reciting in the deed the foreclosure proceedings but making no mention of the power of sale, it was held that this was a valid exercise of the power (*w*). A deed in the usual statutory form with the usual covenants and without any recitals was held to have been made in exercise of the power of sale (*x*).

(*t*) *Hiatt v. Hillman*, 1871, 19 W. R. 694.

(*u*) *In re Solomon and Meagher's Contract*, 1889, 40 Ch.D. 508 (a case of a mortgage made prior to the commencement of the Conveyancing Act, 1881).

(*v*) See §332, *supra*.

(*w*) *Kelly v. Imperial Loan and Investment Co.*, 1884, 11 O.A.R. 526, affirmed, (*Strong and Henry, JJ. dissenting*) 11 Can. S.C.R. 516. See *Maundrell v. Maundrell*, 1802, 7 Ves. 566, 10 Ves. 246; *Bennett v. Aburrow*, 1803, 8 Ves. 609; *Wade v. Paget*, 1784, 1 B.C.C. 363; *Carver v. Richards*, 1860, 27 Beav. 488.

(*x*) *Chatfield v. Cunningham*, 1892, 23 O.R. 153; following *Carver v. Richards*, *supra*; *Kelly v. Imperial Loan and Investment Co.*,

It is provided by s. 22 of the Mortgages Act as follows (y) :

22. Where a sale has been made in professed exercise of the power of sale conferred by section 19, the title of the purchaser shall not be liable to be impeached on the ground that no case had arisen to authorize the exercise of such power, or that such power had been improperly or irregularly exercised, or that such notice has not been given; but any person damaged by any such unauthorized, improper or irregular exercise of the power, shall have his remedy against the person exercising the power.

The corresponding section of the English Conveyancing Act, 1881, provides that where a conveyance is made in professed exercise of the power of sale conferred on mortgagees by the act, the title of the purchaser shall not be impeached on the ground that the power was improperly exercised. Therefore, until the conveyance has been made a person who has contracted to purchase from a mortgagee purporting to sell under the statutory power is not precluded from enquiring whether the vendor was in a position to exercise the power, or from proving *aliunde*, in answer to an action of specific performance, that the power was improperly exercised (z).

The protection afforded by these statutes extends only to the statutory implied power of sale and the purchaser is protected only where there is a professed exercise of such power. The conveyance to the purchaser should therefore recite the power. The protection of the statute, as well as that usually provided in express powers of sale, extends only to purchasers without notice, actual or constructive, of any impropriety or irregularity (a).

supra; cf. *Lockhart v. Yorkshire Guarantee and Securities Corporation*, 1908, 14 B.C.R. 28.

(y) See §332, *supra*.

(z) *Life Interest and Reversionary Securities Corporation v. Hand-in-Hand Fire and Life Insurance Society*, [1898] 2 Ch. 230, explaining and distinguishing *Dicker v. Angerstein*, 1876, 3 Ch.D. 600.

(a) *Bailey v. Barnes*, [1894] 1 Ch. 25, 18 R.C. 510; cf. *Winters v. McKinstry*, 1902, 14 M.R. 294; as to notice, actual or constructive,

In the case of a sale under an express power of sale containing a provision somewhat similar to s. 22 of the Mortgages Act above mentioned, it was held that a sale made to a purchaser in good faith without notice was valid, notwithstanding that it might appear upon the taking of accounts between the mortgagor and the mortgagee that the mortgage had been satisfied at the time of sale (b). Where a mortgage contained a defective power of sale without notice in addition to a power of sale with notice and provided that "no purchaser under said power shall be bound to enquire into the legality or regularity of any sale under the said power," it was held that the fact that the sale was made without notice could not be set up as against a purchaser (c).

Where a sale under a power of sale in a mortgage was irregular and was therefore set aside, it was held that the purchaser should be allowed, as a condition of relief against him, for all improvements made under the belief that he was absolute owner so far as they enhanced the value of the property, and not merely for such improvements as a mortgagee in possession would have been entitled to make, knowing that he was mortgagee (d).

see chapter 7, *Statutable Principles governing Priorities*, §§65 and 66. Generally speaking, however, the doctrine of constructive notice is excluded in the case of a conveyance for value duly registered; see chapter 8, *The Registry Act*, §72. See also the special form of power of sale suggested in §333, *supra*.

(b) *Dicker v. Angerstein*, 1876, 3 Ch.D. 600.

(c) *Campbell v. Imperial Loan Co.*, 1908, 18 M.R. 144.

(d) *Carroll v. Robertson*, 1868, 15 Gr. 173; *McLaren v. Fraser*, 1870, 17 Gr. 567; see the Conveyancing and Law of Property Act, R.S.O. 14, c. 109, s. 37: Where a person makes lasting improvements on land under the belief that the land is his own he or his assigns shall be entitled to a lien upon the same to the extent of the amount by which the value of the land is enhanced by such improvements; or shall be entitled or may be required to retain the land if the Court is of opinion or requires that this should be done, according as may, under all circumstances of the case be most just, making compensation for the land, if retained, as the Court may direct.

Unless the inadequacy of the price paid is so great as to raise a presumption of fraud, the sale to the purchaser is valid, even although the mortgagee may be liable to the owner of the equity of redemption for a greater sum than was realized (e). If a conveyance executed in pursuance of a sale under power is impeached, the purchaser, or those claiming under him, must show a due exercise of the power of sale; the onus of impeaching it is not upon the party alleging the invalidity of the conveyance (f).

Where a creditor of the mortgagor recovers judgment and issues execution after a sale under power of sale is complete and the mortgaged land has been conveyed to the purchaser, the creditor has no status to attack the sale proceedings or to require an account from the mortgagee (g).

By a provision in a mortgage no want of notice was to invalidate any sale thereunder, but the vendor alone was to be responsible. In a conveyance made on a sale under the power of sale it was recited that service of notice had been duly made on the mortgagor and his wife, who had joined to bar dower, and there was no evidence of the untruth of the recital or of the purchaser's knowledge of its untruth. It was held that a subsequent vendor of the land in making title could not be called on to furnish any other evidence of the service of notice (h).

§344. *Application of the proceeds.*

Under the terms of the extended form of power of sale which is the equivalent of the short form provided by the Short Forms of the Mortgages Act, the mortgagee holds the moneys

(e) *Chatfield v. Cunningham*, 1892, 23 O.R. 153; *Latch v. Furlong*, 1866, 12 Gr. 303; *Warner v. Jacob*, 1882, 20 Ch.D. 220.

(f) *Bartlett v. Jull*, 1880, 28 Gr. 140.

(g) *Chatfield v. Cunningham*, *supra*.

(h) *Re Martin and Merritt*, 1901, 3 O.L.R. 284.

arising from the sale upon trust (i): (1) to pay all costs and charges in connection with the sale, or incurred for taxes, rent, insurance and repairs, and all other costs and charges incurred in and about the execution of the trust; (2) to pay the principal and interest thereon to day of payment; and (3) to pay the surplus, if any, to the mortgagor, his heirs, executors, administrators or assigns, or as he or they shall direct and appoint.

In the case of a sale under the implied power of sale provided by the Mortgages Act (j) the money arising from the sale is to be applied as follows: (1) in payment of the expenses incident to the sale or incurred in any attempted sale; (2) in discharge of interest and costs then due in respect of the mortgage under which the sale was made; (3) in discharge of the principal money then due in respect of such mortgage; and (4) in payment of the amounts due to the subsequent encumbrancers according to their priorities; and the residue is to be paid to the mortgagor (k).

A sale under power of sale is a proceeding which is barred after the lapse of ten years without payment or acknowledgment.

But if the right to exercise the power of sale is not barred, the mortgagee is not limited to six years arrears of interest (m). If by the terms of the mortgage the mortgagee is declared to be a trustee of the surplus for the mortgagor lapse of time is not a bar to an action by the mortgagor for an account, but in other cases the mortgagor's action to compel the mortgagee to account for the surplus will be barred.

(i) For the exact wording of the provision as to the application of the proceeds, see §334, *supra*.

(j) See §332, *supra*.

(k) By s. 2 "mortgagor" includes any person deriving title under the original mortgagor or entitled to redeem a mortgage, according to his estate, interest or right in the mortgaged property.

(l) See chapter 26, *Limitation of Actions*, §264.

(m) See §266 in chapter 26.

in six years (*n*). Even where there is no provision in the mortgage declaring the mortgagee to be a trustee of the surplus, he has sometimes in the cases been called a trustee (*o*), but it seems to be more accurate not to describe him as a trustee but to say that he is liable to account for moneys received by him to the use of the mortgagor or other person entitled to the equity (*p*).

It has been held that the mortgagee is entitled to pay the surplus to the apparent owner of the equity of redemption unless he has actual notice of other claims (*q*). If there are conflicting claims or it is doubtful who is entitled to the money, it would seem that the mortgagee may pay it into court (*r*). In England it has been held that where the mortgagee is in doubt as to the persons entitled to receive the surplus proceeds of the sale he may take out an originating summons to have the question determined (*s*).

In Ontario a mortgagee holding any money out of which a married woman shall be dowable may pay the same into court to the credit of the married woman and the other persons interested therein, and the court may make such

(*n*) See §261 in chapter 26. As to the general liability of a mortgagee to account, see chapter 27.

(*o*) *Tanner v. Heard*, 1857, 23 Beav. 555, 18 R.C. 458; *Charles v. Jones*, 1887, 35 Ch.D. 544, at p. 549.

(*p*) *Reddick v. Traders Bank of Canada*, 1892, 22 O.R. 449, at pp. 450, 452, following *Beatty v. O'Connor*, 1884, 5 O.R. 747, and referring to *In re Gregson*, *Christison v. Bolam*, 1887, 36 Ch.D. 223.

(*q*) *Harper v. Culbert*, 1883, 5 O.R. 152.

(*r*) English Trustee Relief Act, of 1847, 10 & 11 V. c. 96; R.S.O. 1914, c. 121, s. 38; *Re Kingsland*, 1879, 8 O.P.R. 77; *Western Canada Loan and Savings Co. v. Court*, 1877, 25 Gr. 151, *contra*; *Charles v. Jones*, 1887, 35 Ch.D. 544, at p. 550; *Boyne v. Robinson*, 1904, 3 N.B. Eq. 57; *In re Fisher Mortgage Sale*, 1911, 4 S.L.R. 374. Under the Ontario statute an order for payment into court is necessary.

(*s*) *In re Cook's Mortgage*, *Lawledge v. Tyndall*, [1896] 1 Ch. 923.

order as may be just for securing the married woman's right of dower in the money (*t*).

If the mortgagee continues to hold the surplus money it is his duty to set it apart and invest it for the benefit of the persons who may establish their claims thereto; and if he neglects to do so he will be chargeable with interest from the completion of the sale (*u*).

Unless the terms of the power of sale authorize the mortgagee to sell on credit, the mortgagee must account for the purchase price as it has been received by him in cash, but if the mortgagee stands ready so to account, a sale on credit, if a real one, is a valid exercise of the power of sale notwithstanding that the power does not authorize a sale on credit (*v*).

If the proceeds of the sale are insufficient to pay the amount owing on the mortgage, the mortgagee may sue the mortgagor on his covenant in order to obtain payment of the deficiency (*w*).

§345. *Power of sale under the Land Titles Acts.*

In Ontario it is provided by the Land Titles Act, R.S.O. 1914, c. 126, s. 35, as follows:

35. Subject to any entry to the contrary on the register the registered owner of a charge with a power of sale, in accordance with the terms of the power, may sell and transfer the interest in the land which is the subject of the charge, or any part thereof, in the same manner as if he were the registered owner of the land to the extent of such interest therein.

Under this provision the registered owner of a charge may exercise a power of sale expressed in the charge precisely in the

(*t*) R.S.O. 1914, c. 70, s. 17; see chapter 18, *Dower and Curtesy in Mortgaged Land*, §174.

(*u*) *Charles v. Jones*, 1887, 35 Ch.D. 544.

(*v*) *Mendels v. Gibson*, 1905, 9 O.L.R. 94; *Thurlow v. Mackeson*, 1868, L.R. 4 Q.B. 97.

(*w*) *Pegg v. Hobson*, 1887, 14 O.R. 272; *Rudge v. Richeus*, 1873, L.R. 8 C.P. 358; cf. chapter 23, *Action on the Covenant*, §227.

same way as a mortgagee in the case of land not under the Land Titles Act might exercise such express power of sale. The sale proceedings are not subject to the supervision or direction of the master of titles, but when the transfer to a purchaser in pursuance of the power is sought to be registered such evidence must then be furnished to the master of titles as will satisfy him of the regularity of the proceedings and of the validity of the transfer. Upon the registration of the transfer the transferee acquires the registered estate which was the subject of the charge.

Under the Manitoba, Saskatchewan and Alberta statutes there is prescribed a procedure for sale by the mortgagee under the supervision of the registrar, and this procedure is applicable to every mortgage under the land titles system, provided, in the case of Saskatchewan, that the mortgage contains an express power of sale (x). Sale proceedings under these statutes resemble sale under power of sale rather than sale under the direction of the court in England and Ontario. Inasmuch, however, as these statutory sale proceedings are a necessary preliminary to foreclosure proceedings, it has seemed more convenient to discuss them in connection with the general subject of foreclosure in an earlier chapter.

It remains to mention here only the question whether as an alternative to the statutory remedy by way of sale a contractual power of sale is valid. This question has not been authoritatively decided, but the better view would seem to be that a mortgagee's only right to sell so as to confer upon a transferee an absolute title free from any claim of the mortgagor is by proceedings in the registrar's office or, in the case of Saskatchewan and Alberta, by recourse to the courts in an action for foreclosure or sale.

(x) See chapter 24, *Action for Foreclosure or Sale*, §247. In §246 in the same chapter some account is given of the history of

Where a mortgage of land under the Real Property Act of Manitoba contained a power of sale without notice but contained no provision dispensing with the official supervision required in the statutory proceedings in the registrar's office, a sale by the mortgagee purporting to be made under that power, without compliance with the statutory requirements or an order of the court, was held to be inoperative to extinguish the registered title of the mortgagor (*y*). It is true that this decision does not absolutely preclude the view that a contractual power of sale, including a power of attorney to the mortgagee to transfer the mortgagor's registered title to a purchaser, might be so worded as to be effective (*z*), but the reasons for judgment of the majority of the court support the view that the statutory procedure is intended to be exclusive (*a*).

the legislation on the subject of sale and foreclosure in Manitoba, Saskatchewan, Alberta, and the Northwest Territories.

(*y*) *Smith v. National Trust Co.*, 1912, 45 Can. S.C.R. 616, 1 D.L.R. 698.

(*z*) See *Scott, Torrens Title Mortgages*, pp. 45 ff; *Rollefson v. Olson*, 1915, 8 S.L.R. 143, at p. 149, 21 D.L.R. 671, at p. 675.

(*a*) See also *Thom, The Canadian Torrens System*, pp. 288, 292; *cr. Re Sun Life Assurance Co. and Widmer*, 1916, 26 D.L.R. 147. As to the general principle that a mortgagee has only such powers of disposition as the statute expressly or impliedly declares, see the passages from the judgment of Duff, J. in *Sn. v. National Trust Co.*, quoted in chapter 10, *The Land Titles Acts*, 299.

CHAPTER XXXII.

APPOINTMENT OF RECEIVER.

- §351. Receiver for equitable mortgagee, p. 686.
- §352. Appointment under the Judicature Act, p. 688.
- §353. Mortgagee's statutory or express power to appoint, p. 690.
- §354. Liability for acts or defaults of receiver, p. 692.
- §355. Powers and liability of receiver, p. 692.

§351. *Receiver for equitable mortgagee.*

As an equitable mortgage does not convey the legal estate (*a*), the general rule is that an equitable mortgagee is not entitled to bring an action for possession against the mortgagor in occupation of the mortgaged lands (*b*) or, apart from express contract between the mortgagor and the equitable mortgagee, to require payment of rent by tenants in occupation (*c*). The equitable equivalent to the taking of possession is the appointment by the court of a receiver of the rents and profits (*d*).

As the equitable mortgagee has no legal right to take possession or to demand payment to himself of the rents, if he serves notice on a tenant requiring the tenant to pay the rent to him, the tenant may refuse payment, for he will get no discharge (*e*). If, however, the tenant pays rent to the equit-

(*a*) See chapter 5, *Equitable Mortgages*, §41.

(*b*) See chapter 22, *Action for Possession*, §212, where the exception in the case of a mortgage which conveys the equity of redemption is mentioned.

(*c*) See chapter 15, *Lessee of Mortgaged Land*, §142.

(*d*) By contract or, in England, by statute, an equitable mortgagee may himself have power to appoint a receiver. See §353, *infra*.

(*e*) *Vacuum Oil Co. v. Ellis*, [1914] 1 K.B. 693 (a case in which

able mortgagee after notice that the rent is claimed by the latter as equitable mortgagee, the mortgagee cannot be compelled to refund the rent to the tenant, and if the payment is made with the knowledge of the landlord (the mortgagor) the payment will afford a good equitable defence to an action by the landlord against the tenant in respect of the same rent (*f*).

Payment of rents to a receiver appointed on behalf of an equitable mortgagee discharges the persons paying them (*g*), and the equitable mortgagee is entitled to retain them as against the mortgagor, and even as against a prior mortgagee, legal or equitable, so far as they are collected before the prior mortgagee intervenes. The prior mortgagee may, however, put an end to the right of the subsequent mortgagee to receive the rents by himself taking possession or, if a receiver appointed by the court at the instance of the subsequent mortgagee is in possession, the prior mortgagee may himself apply to the court to be let into possession or for the discharge of the receiver (*h*), and in such case the prior mortgagee will be entitled to the rents and profits as from the date of the service of his notice of motion (*i*).

Where the mortgagor is in possession, a debenture holder, a puisne mortgagee or other equitable mortgagee is *prima facie* entitled to the appointment of a receiver if the interest is in arrear (*j*), whether the security is scanty or not (*k*), or if

a receiver for the second mortgagee had been appointed, but the second mortgagee attempted to collect the rent himself).

(*f*) *Finck v. Tranter*, [1905] 1 K.B. 427.

(*g*) *Vacuum Oil Co. v. Ellis*, *supra*.

(*h*) *In re Metropolitan Amalgamated Estates, Fairweather v. The Company*, [1912] 2 Ch. 497.

(*i*) *Preston v. Tunbridge Wells Opera House*, [1903] 2 Ch. 323.

(*j*) *Strong v. Carlyle Press*, [1893] 1 Ch. 268; *In re Prytherch, Prytherch v. Williams*, 1889, 42 Ch.D. 590, at p. 600; *Union Bank v. Engen*, 1917, 10 S.L.R. 185, 33 D.L.R. 435.

(*k*) *Alkins v. Blain*, 1867, 13 Gr. 646.

the security is in jeopardy by reason of the insolvency of the mortgagor, although default has not been made under the mortgage (*l*).

A prior mortgagee need not be made a party to the proceedings (*m*), but the appointment should be made subject to the right of the legal mortgagee to take possession (*n*). If the appointment is made without any reservation as to the right of the legal mortgagee, the latter cannot take possession without the leave of the court (*o*).

The court will not, as a general rule, appoint a receiver on the application of a subsequent mortgagee if the prior mortgagee is in possession (*p*), but where a prior mortgagee in possession acquired the equity of redemption and it was shown that he had received more than sufficient to pay off his mortgage, a receiver was appointed (*q*).

§352. *Appointment under the Judicature Act.*

Formerly the court would not appoint a receiver on the application of a mortgagee who had the legal estate, such appointment being unnecessary as the mortgagee by virtue of the legal estate could take possession of the mortgaged property (*r*).

In Ontario it is now provided, however, by the Judicature Act, R.S.O. 1914, c. 56, s. 17, that a receiver may be appointed

(*l*) *McMahon v. North Kent Ironworks Co.*, [1891] 2 Ch. 148; cf. *Edwards v. Standard Rolling Stock Syndicate*, [1893] 1 Ch. 574.

(*m*) *Aikins v. Blain*, *supra*.

(*n*) *Underhay v. Read*, 1887, 20 Q.B.D. 209 at pp. 218, 219; *Berney v. Sewell*, 1820, 1 J. & W. 647.

(*o*) *Angel v. Smith*, 1804, 9 Ves. 335; *Langton v. Langton*, 1855, 7 DeG. M. & G. 30; *Searle v. Choat*, 1884, 25 Ch.D. 723, at p. 727.

(*p*) *Berney v. Sewell*, 1820, 1 J. & W. 647.

(*q*) *Steinhoff v. Brown*, 1865, 11 Gr. 114.

(*r*) *Berney v. Sewell*, 1820, 1 J. & W. 647; *Kelsey v. Kelsey*, 1874, L.R. 17 Eq. 495. As to the right to possession as between mortgagor and mortgagee, see chapter 22, *Action for Possession*, §212.

by an interlocutory order of the court in all cases in which it appears to the court to be just or convenient that such order should be made, and any such order may be made either unconditionally or upon such terms and conditions as the court shall deem just (*s*).

Under this provision a receiver may now be appointed by the court on the application of a legal mortgagee (*t*). As a rule the court will not so appoint, especially if the mortgagee is in possession, so as to relieve the mortgagee from the responsibilities of a mortgagee in possession (*u*), but the fact that the mortgagee is in possession will not necessarily prevent the court from assisting him by the appointment of a receiver if it appears to be just and convenient to make the appointment (*v*), even though the mortgagee has paid himself all his interest and costs out of rents and profits received (*w*). A receiver may be appointed if the mortgagor prevents the mortgagee from taking possession (*x*).

The right to propose a person as receiver belongs generally to the mortgagee applying to have the appointment made. A party to the action will not usually be appointed receiver; if appointed he will not be allowed a salary (*y*). The solicitor for the mortgagee will not be appointed receiver because it is one of the duties of the mortgagee's solicitor to check the receiver's accounts (*z*).

(*s*) Originally enacted by s. 17 (8) of the Ontario Judicature Act, 1881, and in England by s. 25 (8) of the Judicature Act, 1873.

(*t*) *Pease v. Fletcher*, 1875, 1 Ch.D. 273; *In re Pope*, 1886, 17 Q.B.D. 743, at p. 749, 10 R.C. 592, at p. 598.

(*u*) *In re Prytherch, Prytherch v. Williams*, 1889, 42 Ch.D. 590. See chapter 28, *Mortgagee in Possession*, §301.

(*v*) *Tillet v. Nixon*, 1883, 25 Ch.D. 238; *County of Gloucester Bank v. Rudry Merthyr, etc., Colliery Co.*, [1895] 1 Ch. 629.

(*w*) *Mason v. Westoby*, 1886, 32 Ch.D. 206.

(*x*) *Truman & Co. v. Redgrave*, 1881, 18 Ch.D. 547.

(*y*) *Sargant v. Read*, 1876, 1 Ch.D. 600.

(*z*) *In re Lloyd, Allen v. Lloyd*, 1879, 12 Ch.D. 447.

If the mortgagor carries on business on the mortgaged premises, a receiver of the rents and profits of the property appointed at the instance of the mortgagee will not be also appointed manager of the business unless the business or its goodwill is expressly or impliedly included in the mortgage security (a).

§353. *Mortgagee's statutory or express power to appoint.*

In England it is provided by the Conveyancing Act, 1881. (b), as follows:

19.—(1) A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely):—

(iii) A power, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property, or of any part thereof.

24.—(1) A mortgagee entitled to appoint a receiver under the power in that behalf conferred by this Act shall not appoint a receiver until he has become entitled to exercise the power of sale conferred by this Act (c), but may then, by writing under his hand, appoint such person as he thinks fit to be receiver.

(2) The receiver shall be deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver's acts or defaults, unless the mortgage deed otherwise provides.

(3) The receiver shall have power to demand and recover all the income of the property of which he is appointed receiver, by action, distress, or otherwise, in the name either of the mortgagor or of the mortgagee, to the full extent of the estate or interest which the mortgagor could dispose of, and to give effectual receipts accordingly for the same.

(a) *Whitley v. Challis*, [1892] 1 Ch. 64; *Truman & Co. v. Redgrave*, 1881, 18 Ch.D. 547; *County of Gloucester Bank v. Rudry Merthyr, etc. Colliery Co.*, [1895] 1 Ch. 629; *In re Leas Hotel Co.*, *Salter v. The Company*, [1902] 1 Ch. 332.

(b) 44 & 45 V. c. 41, replacing Lord Cranworth's Act, 22 & 23 V. c. 145. The section applies only if and so far as a contrary intention is not expressed in the mortgage deed.

(c) See s. 20 of the statute, quoted in chapter 31, *Sale under Power of Sale*, §332.

(4) A person paying money to the receiver shall not be concerned to inquire whether any case has happened to authorize the receiver to act.

(5) The receiver may be appointed, and a new receiver may be appointed, from time to time by the mortgagee by writing under his hand.

(6) The receiver shall be entitled to retain out of any money received by him, for his remuneration, and in satisfaction of all costs, charges, and expenses incurred by him as receiver, a commission at such rate, not exceeding five per centum on the gross amount of all money received, as is specified in his appointment, and if no rate is so specified, then at the rate of five per centum on the gross amount, or at such higher rate as the Court thinks fit to allow, on application made by him for that purpose.

(7) The receiver shall, if so directed in writing by the mortgagee, insure and keep insured against loss or damage by fire, out of the money received by him, any building, effects, or property comprised in the mortgage, whether affixed to the freehold or not, being of an insurable nature.

(8) The receiver shall apply all money received by him as follows, namely:—

(i) In discharge of all rents, taxes, rates, and outgoings whatever affecting the mortgaged property; and

(ii) In keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right whereof he is receiver; and

(iii) In payment of his commission, and of the premiums on fire, life, or other insurances, if any, properly payable under the mortgage deed or under this Act, and the cost of executing necessary or proper repairs directed in writing by the mortgagee; and

(iv) In payment of the interest accruing due in respect of any principal money due under the mortgage; and shall pay the residue of the money received by him to the person who, but for the possession of the receiver, would have been entitled to receive the income of the mortgaged property, or who is otherwise entitled to that property.

There is no similar statute in force in Ontario, but a mortgage sometimes contains an express power to appoint a receiver. The statute merely adopted the practice of conveyancers in England and set out in a concise and well-considered form that which prior to 1881 had been frequently made the subject of express stipulation (*d*).

(*d*) *White v. Metcalf*. [1903] 2 Ch. 567, at p. 571.

§354. *Liability for acts or defaults of receiver.*

In the case of statutory authority or express authority in a mortgage to appoint a receiver, it is usually provided either that the receiver shall be deemed to be the agent of the mortgagor (*e*) or that the appointment shall be made by the mortgagor, on the nomination of the mortgagee, and if an appointment is made pursuant to such authority, the mortgagor, not the mortgagee, is responsible for the acts or defaults of the receiver, and the mortgagee is not chargeable as a mortgagee in possession (*f*).

A mortgagee may of his own authority appoint a receiver, but in such case the receiver will be the agent of the mortgagee, who will be deemed to have taken possession and will be liable to account as a mortgagee in possession (*g*).

§355. *Powers and liabilities of receiver.*

If a person is appointed by the court to be receiver and manager of a company, he is not the agent of the company. The company does not appoint him and cannot dismiss him, and he is not bound to obey its directions. Only the court can dismiss him, or give him directions as to the mode of carrying on the business, or interfere with him if he is not carrying on the business properly. As it is impossible to suppose that the relation of agent and principal exists between him and the court, the inference is necessarily drawn that he acts in pursuance of his appointment on his own responsibility.

(*e*) As in s. 24 of the English Conveyancing Act, 1881. See §353, *supra*.

(*f*) *Law v. Glenn*, 1867, L.R. 2 Ch. 634, at p. 641; *Jefferys v. Dickson*, 1866, L.R. 1 Ch. 183, at p. 190; *White v. Metcalfe*, [1903] 2 Ch. 567, at p. 570.

(*g*) *Quarrell v. Beckford*, 1816, 1 Madd. 269; *Leith v. Irvine*, 1833, 1 My. & K. 277; *Gaskell v. Gosling*, [1896] 1 Q.B. 669. As to the liability of a mortgagee in possession, see chapter 28, *Mortgagee in Possession*.

ity and not as an agent. He has in fact no principal, and if he gives an order to a third person he will render himself personally liable and must himself look for indemnity to the assets of the company, unless he shows that the order was accepted on the terms that he was not to be personally liable but that the third party was to be paid out of the assets of the business, if they should prove sufficient, or that there were other circumstances which took the case out of the general rule (*h*).

On the other hand if a receiver is appointed under a power in a mortgage or under a statutory power (*i*) he is the agent of the person appointing him unless by the terms of the mortgage or the statute he is declared to be the agent of the mortgagor (*j*). His powers will be those conferred by the mortgage or the statute or by the instrument appointing him, and if he makes contracts within the powers conferred upon him, his principal and not he will be liable (*k*).

(*h*) *Burt, Boulton & Hayward v. Bull*, [1895] 1 Q.B. 276, 18 R.C. 462; cf. *Plumpton v. Burkinshaw*, [1908] 2 K.B. 572.

(*i*) See §353, *supra*.

(*j*) See §354, *supra*.

(*k*) Cf. *Plumpton v. Burkinshaw*, *supra*.

CHAPTER XXXIII.

ATTORNMENT AND DISTRESS.

- §361. Express power to distrain, p. 694.
- §362. Tenancy created by attornment, p. 696.
- §363. Distress in case of attornment, p. 700.
- §364. On what goods the mortgagee may distrain, p. 705.
- §365. What arrears may be recovered by distress, p. 709.
- §366. Attornment under the Land Titles Acts, p. 710.

§361. *Express power to distrain.*

The right of the mortgagee to distrain on the lands of the mortgagor for arrears of interest or of principal does not arise from the relation of mortgagor and mortgagee and is not incident thereto. There are two modes by which this right may be given to the mortgagee, firstly, by a stipulation in the mortgage that the mortgagee may distrain; and secondly, by a provision creating the relation of landlord and tenant between the parties. In the latter case the right to distrain arises by implication as incident to the relation of landlord and tenant (a).

No particular form of words is necessary to give the mortgagee the right to distrain. The mortgage may provide that the mortgagee may distrain for all the mortgage moneys, principal as well as interest, and this without regard to the value of the land and whether the goods are on the mortgaged premises or elsewhere. As between the parties such a stipulation is valid (b).

(a) For an instructive discussion of the rights of a mortgagee in regard to distress, see articles by A. H. Marsh in 6 C.L.T. pp. 217, 265 and 313 (May, June, July, 1886).

(b) *Hobbs v. The Ontario Loan and Debenture Company*, 1890, 18 Can. S.C.R. 483, at p. 552.

In Ontario the usual practice is to insert in a mortgage the short form of distress clause provided by the Short Forms of Mortgages Act (c), as follows:

Provided that the mortgagee may distrain for arrears of interest.

If the mortgage is expressed to be made in pursuance of the statute the foregoing clause has the same effect as if it were in the following terms (d):

And it is further covenanted, declared and agreed by and between the parties to these presents, that if the said mortgagor, his heirs, executors, or administrators, shall make default in payment of any part of the said interest at any of the days or times hereinbefore limited for the payment thereof, it shall and may be lawful for the said mortgagee, his heirs, executors, administrators or assigns, to distrain therefor upon the said lands, tenements, hereditaments and premises, or any part thereof, and, by distress warrant, to recover by way of rent reserved, as in the case of a demise, of the said lands, tenements, hereditaments and premises, so much of such interest as shall, from time to time, be, or remain in arrear and unpaid, together with all costs, charges and expenses attending such levy or distress, as in like cases of distress for rent.

It would seem under the statutory clause that the mortgagee may exercise his right to distrain at any time whether before or after the maturity of the mortgage debt or of any instalment thereof, but only arrears of interest which have accrued before the maturity of the mortgage debt can be distrained for in cases where there is no provision in the mortgage for payment of interest after maturity. In such cases the interest payable after maturity of the principal would be recoverable, not by the terms of the contract, but as damages, and the right to distrain under the statutory clause is given only where the mortgagor makes default in payment at the time limited therefor (e).

(c) R.S.O. 1914, c. 117, schedule B, clause 15.

(d) See chapter 35, *Short Forms of Mortgages Act*, §381.

(e) *Klinck v. Ontario Industrial Loan and Investment Co.*, 1888, 16 O.R. 562; *Powell v. Peck*, 1888, 15 O.A.R. 138.

The clause above mentioned operates simply as a personal license from the mortgagor to the mortgagee rendering it lawful for the latter to distrain upon the goods of the former, and does not create the relation of landlord and tenant (*f*), even when it is read along with the so-called redemise clause by which the mortgagor is entitled to possession until default (*g*), there being no reservation of rent and no redemise for a definite term (*h*).

A mere license to distrain cannot be exercised by the assignee of the mortgagee unless the assigns of the mortgagee are named in the license, nor can the assignee distrain for arrears of rent which accrued due before the assignment, even if the assigns are named (*i*).

A mortgagee having made a first seizure for arrears of interest and abandoned the seizure cannot seize a second time for the same demand. A seizure for more than is due is illegal (*j*).

The effect of the mortgagee's distraining is that the debt in respect of which the distress is made is suspended so long as the mortgagee holds the goods in his hands unsold (*k*).

§362. *Tenancy created by attornment.*

It is well settled that the parties to a mortgage of real property may agree that in addition to their principal relation as mortgagor and mortgagee they shall also as regards the mortgaged lands stand towards each other in the relation of

(*f*) *Trust and Loan Co. v. Lawrason*, 1882, 10 Can. S.C.R. 679.

(*g*) As to this clause, see chapter 22, *Action for Possession*, §214.

(*h*) *Royal Canadian Bank v. Kelly*, 1869, 22 U.C.C.P. 279 (as explained in 14 C.L.J. 8), reversing 19 U.C.C.P. 196, 20 U.C.C.P. 430, 519; *Trust and Loan Co. v. Lawrason*, *supra*.

(*i*) *Brown v. Metropolitan Counties Life Insurance Society*, 1859, 1 El. & El. 832, 9 R.C. 610.

(*j*) *LaVassaire v. Heron*, 1880, 45 U.C.R. 7.

(*k*) *Lehain v. Philpott*, 1875, L.R. 10 Ex. 242; *Fawell v. Andrew*, 1917, 10 S.L.R. 162, 34 D.L.R. 12.

landlord and tenant, the mortgagor remaining in possession as tenant of the mortgagee (*l*).

"Undoubtedly, a mortgagor and a mortgagee have the right to insert in their mortgage deed a clause making the mortgagor attorn as tenant to the mortgagee, and thus by contract constituting the relation of landlord and tenant between them." (*m*)

"There can be no doubt that such clauses contained in mortgage deeds are valid and operative in themselves, and that they may, and ordinarily do create the relationship of tenant and landlord between the mortgagor and mortgagee, and with it the ordinary right of distress which the law attaches to that relationship." (*n*)

A mortgage contained, in addition to the statutory short forms of distress clause and so-called redemise clause (*o*), the following provision: "And the mortgagor doth release all his claims upon the said lands and doth attorn to and become a tenant at will to the [mortgagee] subject to the said proviso." It was held that the relation of landlord and tenant was not validly created so as to entitle the mortgagee to claim the rights of a landlord as against an execution creditor, there being no sufficient reservation of rent (*p*).

The attornment clause may be in the following form:

The mortgagor hereby attorns to the mortgagee and becomes a tenant of the said lands during the term of this mortgage at a rent equivalent to and payable at the same days and times as the payments of interest are hereinbefore agreed to be paid, such rent when so paid to be in satisfaction of such payments of interest. Provided that the mortgagee may on default of payment or on breach of any of the covenants hereinbefore contained enter on the said lands and determine the tenancy hereby created without notice, and that neither

(*l*) *Hobbs v. Ontario Loan and Debenture Co.*, 1890, 18 Can. S.C.R. 483, at pp. 492, 493.

(*m*) *Ex parte Jackson, In re Bowes*, 1880, 14 Ch.D. 725 at p. 739, Cotton L.J.

(*n*) *Ibid.*, 14 Ch.D. at p. 743, Thesiger, L. J.

(*o*) Which in themselves do not create the relation of landlord and tenant. See §361, *supra*.

(*p*) *Trust and Loan Co. v. Lawrason*, 1882, 10 Can. S.C.R. 679, affirming, by an equally divided court, 6 O.A.R. 286. See also §363, *infra*, as to the requirements of a valid tenancy.

the existence of this clause nor anything done by virtue thereof shall render the mortgagee liable as mortgagee in possession so as to be accountable for any moneys except those actually received.

Where a mortgage contained the following attornment clause: "And the said mortgagor doth hereby attorn to and become tenant of the said lands to the mortgagees at a yearly rental of \$96 to be paid in the manner and upon the terms hereinbefore appointed for the payment of interest," it was held that the relation of landlord and tenant was validly created (*q*).

It is not necessary to the creation of a valid tenancy that the mortgage should be executed by the mortgagee, notwithstanding the provisions of the Statute of Frauds (*r*).

The admission under seal by the mortgagor of the terms of the demise amounts to an estoppel binding on him (*s*).

The attornment to the mortgagee by deed executed by the mortgagor in possession and delivered to the mortgagee is sufficient evidence of the creation of the tenancy between the parties (*t*), and it is not essential to the creation of a valid tenancy that the mortgagor should be let into possession. It is sufficient if there is a continued occupation by the mortgagor instead of a change of possession and a letting into possession again (*u*).

In order to create the relation of landlord and tenant the legal reversion of the lands need not be in the mortgagee.

(*q*) *Linstead v. The Hamilton Provident and Loan Society*, 1896, 11 M.R. 199.

(*r*) 29 Car. 2, c. 3; R.S.O. 1914, c. 102, ss. 2, 3, 4.

(*s*) *Hobbs v. The Ontario Loan and Debenture Company*, 1890, 18 Can. S.C.R. 483; *Morton v. Woods*, 1869, L.R. 4 Q.B. 293, affirming L.R. 3 Q.B. 658. See also *Ex parte Volsey, In re Knight*, 1882, 21 Ch.D. 442.

(*t*) *West v. Fritche*, 1848, 3 Exch. 216; *Morton v. Woods*, 1868, L.R. 3 Q.B. 658, 4 Q.B. 293; *Ex parte Volsey, in re Knight*, 1882, 21 Ch.D. 442.

(*u*) *Morton v. Woods, supra*; *West v. Fritche*, 1848, 3 Exch. 216.

"Although it may appear on the face of the deed that the defendants, the lessors, have not the legal estate yet the tenant and those who claim through him are estopped, after he has attorned, from denying that the relation of landlord and tenant existed between the defendants and the mortgagor so as to pass as between them the reversion of the lessor." (v)

There may be two or more attornments by the same mortgagor to different mortgagees; and the mortgagees will be entitled to distrain for the purposes of their respective mortgages and during the same period of time.

"If by a contract, notwithstanding the fact is known that the legal estate is outstanding in a mortgagee, and that the mortgagor is not really the owner of the reversion, you can create a tenancy between the second mortgagee and the mortgagor by what may be called estoppel, or *quasi* estoppel (it does not matter what term we use). It appears to me that there is nothing either in law or in good sense to prevent the same arrangement being made with more than one mortgagee." (w)

A tenancy from year to year or from month to month will be a good yearly or monthly tenancy notwithstanding that the mortgage contains a proviso that it may be determined at any time at the will of the mortgagee (x). There may be a tenancy at will although the rent reserved is payable yearly (y).

The creation of the relation of landlord and tenant by express stipulation does not alter the equitable relation existing between them which arises out of the relation of mortgagor and mortgagee. The existence of the tenancy may, however, interfere with the mortgagee's right to take possession unless he has the right to determine the tenancy at any time (z); and a clause giving the mortgagee this right is valid (a).

(v) *Morton v. Woods*, 1868, L.R. 3 Q.B. 658 at p. 667.

(w) *Ex parte Punnett*, 1880, 16 Ch.D. 226, at p. 234.

(x) *In re Threlfall*, 1880, 16 Ch.D. 274; *Ex parte Voisey*, *In re Knight*, *supra*; *Kemp v. Lester*, [1896] 2 Q.B. 162.

(y) *Doe d. Dixie v. Davies*, 1851, 7 Ex. 89.

(z) *In re Stockton Iron Furnace Co.*, 1879, 10 Ch.D. 335.

(a) *Doe d. Garrod v. Olley*, 1840, 12 A. & E. 481; *Metropolitan Counties &c. Assurance Society v. Brown*, 1859, 4 H. & N. 428.

It has been held that an attornment clause creating the relation of landlord and tenant does not in itself render the mortgagee liable to account as a mortgagee in possession (*b*), but in view of the dicta to the contrary (*c*) it is prudent to add to an attornment clause a proviso that the mortgagee shall not thereby be rendered liable as mortgagee in possession so as to be accountable for any moneys except those actually received (*d*).

§363. *Distress in case of attornment.*

If a tenancy is validly created by attornment the mortgagee will have the ordinary rights of a landlord, including the right of distress (*e*), not only as between the mortgagee and the mortgagor but in respect of third parties. To the extent permitted by statute (*f*) the mortgagee may distrain on the goods of a stranger found upon the demised premises and his rights will be good against execution creditors of the mortgagor (*g*).

In order that the mortgagee may have the right to distrain as against creditors of the mortgagor or upon goods of a stranger it must appear that it was the intention of the parties, acting in good faith, to create a real tenancy at the rent reserved and not merely, under colour or pretence of a lease, to give to the mortgagee an additional security, inci-

(*b*) *Stanley v. Grundy*, 1883, 22 Ch.D. 478, 3 R.C. 569.

(*c*) *In re Stockton Iron Furnace Co.*, *supra*; *Ex parte Punnett*, *supra*; *Ex parte Harrison*, *In re Betts*, 1881, 18 Ch.D. 127.

(*d*) As in the form of attornment clause suggested above. As to the liabilities of a mortgagee in possession, see chapter 28.

(*e*) *Ex parte Jackson*, *In re Bowes*, 1880, 14 Ch.D. 725 at p. 743; *Pegg v. Independent Order of Foresters*, 1901, 1 O.L.R. 97.

(*f*) See the statutes referred to below and those referred to in §364, *infra*.

(*g*) *Hobbs v. Ontario Loan and Debenture Co.*, 1890, 18 Can. S.C.R. 483, at p. 493; *Kearsley v. Phillips*, 1883, 11 Q.B.D. 621.

dental to his character of mortgagee, in case of the insolvency of the mortgagor (*h*).

It is material in determining the *bona fides* of the tenancy to consider the amount of rent reserved by the mortgage. Where the rent is out of all proportion to the annual value of the lands the inference is that it was not the intention of the parties in good faith to create a tenancy.

"So far as any inference can be drawn from the practice of inserting attornment clauses, it appears to me that the benefit to be derived from the attornment clause was intended to be an equivalent for that which the mortgagee would derive from the rent if the tenant had been a stranger. What would that equivalent be? Would it not be a right to the payment of a fair and reasonable rent such as the ordinary tenant would be willing to give for the property under ordinary circumstances? That, as it seems to me, is the rent for which a properly prepared attornment clause should make provision, not necessarily the exact amount which a tenant would pay for the property but such an amount as a willing tenant would probably pay as a *bona fide* rent. If the rent so reserved is clearly in excess of what would be a fair and reasonable rent, it appears to me that although you may call it rent it is no longer a real rent but a fictitious payment under the name of rent." (*i*)

So, where a mortgage of real estate provided that the moneys secured thereby amounting to \$20,000 should be payable with interest at seven per cent. per annum as follows: \$500 on December 1st, 1883; \$500 on the first days of June and December in each of the four following years; \$15,500 on June 1st, 1888; and contained an attornment clause reserving rent equal in amount to the amounts so payable; it was held that the rent reserved was so unreal and excessive as to show conclusively that the parties could not have intended to create

(*h*) Ex parte Jackson, In re Bowes, 1880, 14 Ch.D. 725; Hobbs v. Ontario Loan and Debenture Co., 1890, 18 Can. S.C.R. 483; Thomas v. Cameron, 1885, 8 O.R. 441.

(*i*) Ex parte Jackson, In re Bowes, 1880, 14 Ch.D. 725, at pp. 733, 734; Waterous Engine Works v. Wells and Bank of Montreal, 1911, 4 S.L.R. 48; Independent Lumber Co. v. David and Hurlburt, 1911, 5 S.L.R. 1. 316.

a tenancy and that the arrangement was unreal and fictitious (*j*). The stipulation, however, will be supported if the rent although a large rent, is one which a tenant honestly might agree to pay and the landlord honestly might expect to receive (*k*).

A mortgagee may apply the proceeds of a distress for rent in payment of whatever is due to him whether for principal or interest. A contrary intention is not shown by the fact that the amount fixed for rent is equal to the sum due for interest and is payable on the same days (*l*).

A rent that is certain is essential to the creation of a valid tenancy. The rent must be fixed and certain but it may fluctuate. It is sufficient if by calculation it may be rendered certain. *Id certum est quod certum reddi potest*. Thus where the rent reserved was a monthly instalment of a fixed amount together with a fine of five per cent. per month on the whole amount unpaid, the rent was held to be sufficiently ascertained (*m*). Where, however, a mortgage contained a special provision by which the mortgagors became lessees of the mortgaged lands until the maturity of the mortgage at a rental of the same amount as the interest, and the mortgagee distrained for arrears of interest which accrued after the maturity of the mortgage, it was held that there was no definite tenancy after the maturity of the mortgage and that, the interest thereafter being recoverable not by the terms of the contract but as

(*j*) *Hobbs v. Ontario Loan and Debenture Co.*, 1890, 18 Can. S.C.R. 483; *Imperial Loan & Investment Company v. Clement*, 1896, 11 M.R. 428, 445; *Strikeman v. Fummerton*, 1911, 21 M.R. 754.

(*k*) *Ex parte Williams*, *In re Thompson*, 1877, 7 Ch.D. 138; *In re Stockton Iron Furnace Co.*, 1879, 10 Ch.D. 335.

(*l*) *Ex parte Harrison*, *In re Betts*, 1881, 18 Ch.D. 127, overruling *Hampson v. Fellows*, 1868, L. R. 6 Eq. 575; cf. *McDonnell v. Building and Loan Association*, 1886, 10 O.R. 580.

(*m*) *Ex parte Voisey*, *In re Knight*, 1882, 21 Ch.D. 442; *Trust and Loan Company v. Lawrason*, 1882, 10 Can. S.C.R. 679.

damages, the rent became uncertain and therefore there was no right of distress (n).

Where a mortgage deed contains a stipulation that the mortgagor shall become tenant to the mortgagee upon default in any of the payments the mortgagee has no right to distrain unless he shall have given notice previously to the mortgagor that he intends to treat him as a tenant (o).

It is provided in Ontario by the Landlord and Tenant Act, R.S.O. 1914, c. 155, s. 40, as follows:

40. A person having any rent due and in arrear, upon any lease for life or lives or for years, or at will, ended or determined, may distrain for such arrears, after the determination of the lease, in the same manner as he might have done if the lease had not been ended or determined, if such distress is made within six months after the determination of the lease, and during the continuance of the landlord's title or interest, and during the possession of the tenant from whom the arrears became due.

This provision is derived from the English statute 8 Anne, c. 18 (c. 14 in Ruffhead's edition), ss. 6 and 7. It is applicable to a tenancy created by an attornment clause in a mortgage (p).

It is further provided by the Landlord and Tenant Act, s. 55, as follows:

55.—(1) Goods or chattels lying or being in or upon any land leased for life or lives, or term of years, at will or otherwise shall not be liable to be taken by virtue of any execution issued out of the Supreme Court or out of a County or District Court on any pretence whatsoever, unless the party at whose suit the execution is sued out before the removal of such goods or chattels from the premises by virtue of such execution pays to the landlord or his bailiff all money due for rent of the premises at the time of the taking of such goods or chattels by virtue of such execution if the arrears of rent do not amount to more than one year's rent.

(n) *Klinck v. The Ontario Industrial Loan and Investment Company*, 1888, 16 O.R. 562.

(o) *Clowes v. Hughes*, 1870, L.R. 5 Ex. 160.

(p) *Klinck v. Ontario Industrial Loan and Investment Co.*, *supra*.

(2) If such arrears exceed one year's rent the party at whose suit such execution is sued out, on paying the landlord or his bailiff one year's rent, may proceed to execute his judgment.

(3) The sheriff or other officer shall levy and pay to the execution creditor as well the money so paid for rent as the execution money.

This provision is derived from the English statute 8 Anne, c. 18 (c. 14 in Ruffhead's edition), s. 1.

In England an attornment clause, unless registered under the Bills of Sale Acts of 1878 and 1882, is void so far as the right to distrain is concerned (*q*), but in Ontario such a clause does not come within the Bills of Sale and Chattel Mortgages Act (*r*).

Pending the distress the goods taken by the mortgagee are in the custody of the law and not liable to seizure by chattel mortgagees or execution creditors so long as no fraud is on foot and no intention or contrivance exists to prejudice chattel mortgagees (*s*).

If the mortgagee obtains a judgment for the interest or for the principal and interest, the remedy of distress is not thereby merged. A judgment is but a security for the debt until it be satisfied, and does not operate to change any other concurrent remedy which the mortgagee may have (*t*).

The power to distrain under a tenancy from year to year or for a term of years may be exercised by the devisees of the mortgagee (*u*). Where the tenancy is a tenancy at will

(*q*) *Munford v. Collier*, 1890, 25 Q.B.D. 279; *Green v. Marsh*, [1892] 2 Q.B. 330.

(*r*) *Trust and Loan Co. v. Lawrason*, 1881, 6 O.A.R. 286, at p. 290, S.C. 10 Can. S.C.R. 679; cf. *McDermott v. Fraser*, 1915, 25 M.R. 298, 23 D.L.R. 430.

(*s*) *Anderson v. Henry*, 1898, 29 O.R. 719.

(*t*) *Drake v. Mitchell*, 1803, 3 East 251; *Westmoreland &c. Slate Co. v. Fielden*, [1891] 3 Ch. 15; *Wegg Prosser v. Evans*, [1894] 2 Q.B. 101, [1895] 1 Q.B. 108.

(*u*) *West v. Fritche*, 1818, 3 Exch. 216.

it comes to an end with the death of the mortgagor, and the mortgagee cannot distrain upon the heirs (*v*).

It is provided in Ontario by the Landlord and Tenant Act, R.S.O. 1914, c. 155, s. 59, as follows:

59. The executors or administrators of a landlord may distrain for the arrears of rent due to such landlord in his lifetime, and may sue for the same in like manner as such landlord might have done if living, and the powers and provisions contained in this Act relating to distresses for rent shall be applicable to the distresses so made.

§364. *On what goods the mortgagee may distrain.*

If a mortgagee has a right of distress by virtue of a tenancy created by attornment (*w*), there are certain limitations imposed by statute upon his right.

It is provided in Ontario by the Landlord and Tenant Act, R.S.O. 1914, c. 155, s. 31, as follows:

31.—(1) A landlord shall not distrain for rent on the goods and chattels of any person except the tenant or person who is liable for the rent, although the same are found on the premises; but this restriction shall not apply in favour of a person claiming title under an execution against the tenant, or in favour of a person whose title is derived by purchase, gift, transfer, or assignment from the tenant, whether absolute or in trust, or by way of mortgage or otherwise, nor to the interest of the tenant in any goods or chattels on the premises in the possession of the tenant under a contract for purchase, or by which he may or is to become the owner thereof upon performance of any condition, nor where goods or chattels have been exchanged between tenants or persons by the one borrowing or hiring from the other for the purpose of defeating the claim of or the right of distress by the landlord, nor shall the restriction apply where the property is claimed by the wife, husband, daughter, son, daughter-in-law, or son-in-law of the tenant, or by any other relative of his, if such other relative lives on the premises as a member of the tenant's family, or by any person whose title is derived by purchase, gift, transfer or assignment from any relative to whom such restriction does not apply.

(2) Nothing in this section shall exempt from distress goods or chattels in a store or shop managed or controlled by an agent or

(*v*) *Scoble v Collins*, [1895] 1 Q.B. 375.

(*w*) §362, *su ra.*

clerk for the owner of such goods or chattels where such clerk or agent is also the tenant and in default, and the rent is due in respect of the store or shop or premises rented therewith and thereto belonging, if such goods or chattels would have been liable to seizure but for this Act

(3) Subject to the provisions of section 34 (x), "tenant" in this section shall include a sub-tenant and the assigns of the tenant and any person in actual occupation of the premises under or with the assent of the tenant during the currency of the lease, or while the rent is due or in arrear, whether or not he has attorned to or become the tenant of the landlord.

A tenant who has been let into possession by a lessor (y) or who has attorned to the lessor under seal (z) is estopped from denying his lessor's title, but third persons, not claiming possession of the land under the tenant are not so estopped. Therefore a person who lets premises to which he has no title to a tenant, cannot distrain for arrears of rent due from the tenant on the goods of a third person which happen to have been brought on the premises by the tenant's license (a). If, however, the lessor has the title to the land he would, apart from the statute above mentioned, have the right to distrain on the goods of a third person (b), and he still has the right to do so in the exceptional cases mentioned in the statute.

If a mortgagee's right to distrain is founded only upon an express power to distrain under the so-called statutory distress clause (c), the right is merely a personal license to distrain upon the goods of the mortgagor. There being no

(x) Which requires that the landlord who desires to seize exempted goods shall serve upon the tenant a notice in a prescribed form

(y) *Cooke v. Loxley*, 1792, 5 T.R. 4, 15 R.C. 297; *Delaney v. Fox*, 1857, 2 C.B.N.S. 768, 15 R.C. 299.

(z) *Ex parte Voisey*, *In re Knight*, 1882, 21 Ch.D. 442, at p. 456.

(a) *Tadman v. Henman*, [1893] 2 Q.B. 168

(b) *Lyons v. Elliott*, 1876, 1 Q.B.D. 210, at 213; *Clarke v. Millwall Dock Co.*, 1886, 17 Q.B.D. 494, 9 R.C. 655.

(c) I.e. under the distress clause contained in schedule B to the Short Forms of Mortgages Act. See §361, *supra*.

tenancy, the mortgagee has not the ordinary right of a landlord to distrain upon the goods of a stranger found upon the premises, even as limited by s. 31 of the Landlord and Tenant Act (*d*).

In 1886 was enacted the provision which is now contained in the Mortgages Act, R.S.O. 1914, c. 112, s. 13, as follows:

13. The right of a mortgagee to distrain for interest in arrear upon a mortgage made after the 25th day of March, 1886, shall be limited to the goods and chattels of the mortgagor, and to such of them as are not exempt from seizure under execution.

As regards the right to distrain merely under an express power to distrain this section simply declares the law, except that the right to distrain is further limited to such goods and chattels of the mortgagor as are not exempt from seizure under execution (*e*).

There has, however, been considerable difference of opinion on the question whether this section applies also to the case of a mortgagee who has a right to distrain by virtue of a tenancy created by attornment or whether the mortgagee in such case has the ordinary right of a landlord to distrain as limited only by s. 31 of the Landlord and Tenant Act. This question is complicated by the fact that in 1887 the Mortgages Act was further amended by the addition of a section providing that the mortgagee's right to distrain "for arrears of interest or for rent" should be restricted to one year's arrears of such "interest or rent" (*f*). The distinction drawn in the statute

(*d*) *Trust and Loan Co. v. Lawrason*, 1882, 6 O.A.R. 286, 10 Can. S.C.R. 679; *Edmonds v. Hamilton Provident and Loan Society*, 1891, 18 O.A.R. 347, at p. 358.

(*e*) As to the goods and chattels of a debtor which in Ontario are exempt from seizure under execution, see the Execution Act, R.S.O. 1914, c. 80. Goods and chattels which are exempt from seizure under execution are not liable to seizure by distress by a landlord for rent with certain exceptions specified in the Landlord and Tenant Act, R.S.O. 1914, c. 155, ss. 30, 33 and 34.

(*f*) Now R.S.O. 1913, c. 112, s. 14. See the text of the section in §365.

of 1887 between interest and rent, if applied to the statute of 1886, would seem to lead to the conclusion that the statute of 1886 should be limited to the case of distress for interest. It has been held, however, in Ontario that the statute of 1886 applies also to the case of distress under a tenancy created by attornment (*g*).

Osler, J.A. said:

"This section has also, I think, the effect of limiting in the same way any right of distress which the mortgagees might otherwise have had under another clause in the mortgage by which the mortgagors 'attorn to and become tenants at will to the mortgagees, at a rent equal in amount to the interest reserved, payable at the time mentioned in the proviso.' This section is a general one taken from section 3 of 49 Vict. ch. 29, *An Act Respecting Landlords and Tenants and Distresses*. Had it been intended to deal only with the mortgagee's right to distrain under a mere license, the enactment would have been unnecessary. I think the intention was to reach every case in which the mortgagee whether in the character of landlord or licensee, still under and for the purposes of the mortgage, had the right to distrain. The section is wide enough to cover every case and I cannot accede to the argument that the next section, which is taken from a subsequent act, controls its generality" (*h*).

In Manitoba it has been held that a similar statute has reference not to the right of a mortgagee to distrain for rent under a tenancy validly created but only to the right to distrain for interest under a mere license to distrain, such as the statutory short form of distress clause (*i*).

Where a mortgage deed contains a provision that the mortgagee may distrain for arrears of interest and also an attornment clause by which the mortgagor becomes a tenant of the mortgagee, and the mortgagee distrains for arrears of interest,

(*g*) *Edmonds v. Hamilton Provident and Loan Society*, 1891, 18 O.A.R. 347. The contrary view, expressed in *Burton, J. A.*'s judgment, seems more reasonable.

(*h*) 18 O.A.R. 347, at p. 358. See also *Vousden v. Hopper*, 1911, 4 S.L.R. 1, at pp 6, 7.

(*i*) *Linstead v. Hamilton Provident and Loan Society*, 1896, 11 M.R. 199; *McDermott v. Fraser*, 1915, 25 M.R. 298, 23 D.L.R. 430.

but not for rent as such, on the crops of a lessee of the mortgagor, the distress is wholly illegal for the defendant can take only the goods of the mortgagor for arrears of interest (j).

§365. *What arrears may be recovered by distress.*

It is provided in Ontario by the Mortgages Act, R.S.O. 1914, c. 112, s. 14, as follows:

14.—(1) As against creditors of a mortgagor, or person in possession of mortgaged premises under a mortgagor, the right, if any, to distrain upon the mortgaged premises for arrears of interest or for rent, in the nature of or in lieu of interest under the provisions of any mortgage executed after the 23rd day of April, 1887, shall be restricted to one year's arrears of such interest or rent.

(2) This restriction shall not apply unless some one of such creditors shall be an execution creditor, or unless there shall be an assignee for the general benefit of such creditors appointed before lawful sale of the goods and chattels distrained, nor unless the officer executing such writ of execution or such assignee shall, by notice in writing to be given to the person distraining or his attorney, bailiff, or agent before such lawful sale, claim the benefit of such restriction.

(3) When such notice is given the distrainer shall relinquish to the officer or assignee the goods and chattels so distrained, upon receiving one year's arrears of such interest or rent and his reasonable costs of distress, or if such arrears and costs shall not be paid or tendered he shall sell only so much of the goods and chattels distrained as shall be necessary to satisfy one year's arrears of such interest or rent and the reasonable costs of distress and sale, and shall thereupon relinquish any residue of them, and pay any residue of moneys, proceeds thereof so distrained, to such officer or assignee.

(4) An officer executing an execution, or an assignee who pays any money to relieve goods and chattels from distress under this section, shall be entitled to reimburse himself therefor out of the proceeds of the sale thereof.

(5) The goods and chattels distrained shall not be sold except after such public notice as is now required to be given by a landlord who sells goods and chattels distrained for rent.

(j) *Miller v. Imperial Loan and Investment Company*, 1896, 11 M.R. 247. See also *Edmonds v. Hamilton Provident and Loan Society*, 1891, 18 O.A.R. 347.

Apart from the foregoing section a mortgagee is not entitled to recover out of the land by distress or action more than six years' arrears of rent or interest, though in an action on the covenant he may recover ten years' arrears or, in the case of mortgages made before the 1st day of July, 1894, twenty years' arrears (*k*).

§366. *Attornment under the Land Titles Acts.*

It has been held in Saskatchewan (*l*), in accord with an earlier decision in Alberta (*m*), that an attornment clause in a mortgage under the Land Titles Act, though it may create contractual rights between the parties and a tenancy by estoppel as against the mortgagor and persons in privity with him, does not create the relation of landlord and tenant as against other persons (as, for instance, execution creditors), and does not confer on the mortgagee the protection of the statute 8 Anne, c. 14, s. 1 (*n*).

The alleged inapplicability to a mortgage under the Land Titles Acts of the principles of the English and Ontario cases as to the creation by attornment of a real tenancy between the mortgagor and mortgagee is based chiefly upon the fact that a mortgage under the Land Titles Acts does not convey any estate to the mortgagee but operates by way of security merely. As the estate remains in the mortgagor, it is said that

(*k*) See chapter 26, *Limitation of Actions*, §§266 and 261.

(*l*) *First National Bank v. Cudmore*, 1917, 10 S.L.R. 201, 34 D.L.R. 251.

(*m*) *Hyde v. Chapin Co.*, 1916, 26 D.L.R. 381, 9 W.W.R. 1142.

(*n*) This section provides in effect that goods lying or being in or upon premises which are leased shall not be liable to seizure under execution unless the execution creditor first satisfies the landlord's claim for rent to the extent of one year's arrears. See R.S.O. 1914, c. 155, s. 55, quoted in §363, *supra*.

there is no foundation for a redemise and no reversion in the mortgagee to which the rent is incident (o).

It is, however, now provided in Saskatchewan by the Land Titles Act, 1917, s. 116, as follows:

116. A mortgagor may agree in writing to become the tenant of the mortgagee, and in case of such agreement heretofore or hereafter made the relationship of landlord and tenant shall be held to have been validly constituted between the parties for all purposes and as against all persons whomsoever: Provided that nothing herein contained shall affect the rights of any parties in any action or other proceeding now pending.

(c) See *First National Bank v. Cudmore, supra*; *Hyde v. Chapin, supra*. Scott, *Torrens System Mortgages*, at pp. 167 ff., suggests various reasons why these decisions are not altogether satisfactory.

CHAPTER XXXIV.

FIRE INSURANCE.

- §371. Insurable interest, p. 712.
- §372. Right or obligation to insure, p. 714.
- §373. Insurance in the name of the mortgagor, p. 716.
- §374. Mortgage clause in insurance policy, p. 721.
- §375. Insurance in the name of the mortgagee, p. 724.
- §376. Application of insurance money, p. 726.

§371. *Insurable interest.*

The mortgagor has by virtue of his equity of redemption an insurable interest in the mortgaged property, and his right to insure is co-extensive with the value of the property (*a*), but if he makes an absolute transfer of his equity of redemption he no longer has an insurable interest, and any insurance then existing in his favour ceases to be effectual unless it be assigned with the consent of the insurers to the transferee of the equity of redemption. In the absence of a transfer of the equity of redemption, the mortgagor's insurable interest does not cease until the mortgage debt has been paid, even though the mortgage has been foreclosed, for the mortgagor may nevertheless continue to be liable for the mortgage debt (*b*).

By a condition in a policy of insurance against fire the policy was to become void "if the assured is not the sole and unconditional owner of the property . . . or if the interest of the assured in the property whether as owner, trustee . . . mortgagee, lessee or otherwise is not truly stated." It was held that a mortgagor was sole and uncondi-

(*a*) *Glover v. Black*, 1763, 1 Wm. Bl. 396; 3 Burr. 1394.

(*b*) *Parsons v. Queen Insurance Co.*, 1878, 29 U.C.C.P. 188, at p. 211

tional owner within the terms of the condition. By another condition the policy was to be avoided if the assured should have or obtain other insurance, whether valid or not, on the property. The assured applied for other insurance, but before being notified of the acceptance of his application the premises were destroyed by fire. It was held that there was no breach of the condition (c).

A mortgagor who had made a mortgage, pursuant to the Short Forms of Mortgages Act, containing a covenant to insure the mortgaged premises against fire, effected an insurance thereon with the defendant company, the loss, by the policy, being payable to the plaintiff, the mortgagee, as his interest might appear under the mortgage. Subsequently the mortgagor conveyed his equity of redemption to the mortgagee without the consent of the company having been obtained therefor. The premises having been afterwards destroyed by fire, it was held that the plaintiff was not entitled to the insurance moneys, for (1) the fact of the conveyance made by the mortgagor to the plaintiff, whereby the former ceased to have any interest at the time of the fire, was a good answer to the claim; and (2) such conveyance constituted a breach of a statutory condition which provides against the insured premises being assigned without the company's consent (d).

In order to come within a condition providing against the assignment of the insured premises, an assignment must be an absolute transfer of the subject matter. An assignment by way of mortgage (e) or an agreement to sell, the vendor

(c) *Western Assurance Co. v. Temple*, 1901, 31 Can. S.C.R. 373, following *Commercial Union Assurance Co. v. Temple*, 1898, 29 Can. S.C.R. 206.

(d) *Pinhey v. Mercantile Fire Insurance Co.*, 1901, 2 O.L.R. 296.

(e) *Sands v. Standard Insurance Co.*, 1879, 26 Gr. 113, 27 Gr. 167; *Sovereign Fire Insurance Co. v. Peters*, 1885, 12 Can. S.C.R. 33.

retaining the legal estate (*f*), does not constitute a breach of the condition.

A mortgagee, unpaid vendor or other person having a limited interest in property, may effect insurance either (1) on his own interest merely, or (2) on his own interest as well as the interests of all other persons in the property. For instance, a mortgagee may effect insurance either (1) on his own interest as mortgagee or (2) on the property as a whole, including the equity of redemption (*g*).

It has been held in New Brunswick that the interest of the mortgagee as such ends on foreclosure absolute, and that if a loss occurs thereafter the mortgagee cannot recover on a policy issued to him as mortgagee (*h*).

§372. *Right or obligation to insure.*

It is usual in Ontario to insert in a mortgage the short form of covenant provided by the Short Forms of Mortgages Act, as follows:

And that the said mortgagor will insure the buildings on the said lands to the amount of not less than _____ of lawful money of Canada.

In the case of a mortgage expressed to be made in pursuance of the statute, the foregoing covenant has the same effect as if it were in the following terms (*hh*):

And also that the said mortgagor or his heirs, executors, administrators or assigns shall and will forthwith insure unless already

(*f*) *Keefer v. Phoenix Insurance Co.*, 1901, 31 Can. S.C.R. 144; *Trotter and Douglas v. Calgary Fire Insurance Co.*, 1910, 3 A.L.R. 12.

(*g*) *Castellain v. Preston*, 1883, 11 Q.B.D. 380, at p. 398; *Keefer v. Phoenix Insurance Co.*, 1901, 31 Can. S.C.R. 144, at pp. 148, 149. As to insurance of limited interests, see an article by William Harvey in 10 L.Q.R. 48 (Jan., 1894). As to insurance in the name of the mortgagee, see §375, *infra*.

(*h*) *Gaskin v. Phoenix Insurance Co.*, 1866, 11 N.B.R. (6 Allen) 249

(*hh*) R. S. O. 1914, c. 117, s. 3. See chapter 35, *Short Forms of Mortgages Act*, §381.

insured, and during the continuance of this security keep insured against loss or damage by fire, in such proportions upon each building as may be required by the said mortgagee, his heirs, executors, administrators or assigns, the messuages and buildings erected on the said lands, tenements, hereditaments and premises hereby conveyed or mentioned, or in which so to be, in the sum of of lawful money of Canada, at the least, in some insurance office to be approved of by the said mortgagee, his heirs, executors, administrators or assigns, and pay all premiums and sums of money necessary for such purpose, as the same shall become due, and will on demand assign, transfer and deliver over unto the said mortgagee, his heirs, executors, administrators or assigns, the policy or policies of insurance, receipt or receipts thereto appertaining; and if the said mortgagee, his heirs, executors, administrators or assigns, shall pay any premiums or sums of money for insurance of the said premises or any part thereof, the amount of such payment shall be added to the debt hereby secured, and shall bear interest at the same rate from the time of such payments and shall be payable at the time appointed for the then next ensuing payment of interest on the said debt.

Under the Mortgages Act, R.S.O. 1914, c 112, in the case of a mortgage which contains no power to insure and no declaration excluding the application of Part II. of the statute, there is a power to insure as therein provided (k).

In England it is provided by the Conveyancing Act, 1881, ss. 19 and 23, as follows:

19.—(1) A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely):

(ii) A power, at any time after the date of the mortgage deed, to insure and keep insured against loss or damage by fire any building, or any effects or property of an insurable nature, whether affixed to the freehold or not, being or forming part of the mortgaged property, and the premiums paid for any such insurance shall be

(i) R.S.O. 1914, c. 117, schedule B, clause 12.

(j) R.S.O. 1914, c. 117, s. 3. See chapter 35, *Short Forms of Mortgages Act*, §381.

(k) R.S.O. 1914, c. 112, ss. 19, 26. See chapter 31, *Sale under Power of Sale*, §332, where the provisions of these statutes are quoted.

a charge on the mortgaged property in addition to the mortgage money, and with the same priority, and with interest at the same rate, as the mortgage money.

23. -(1) The amount of an insurance effected by a mortgagee against loss or damage by fire under the power in that behalf conferred by this Act, shall not exceed the amount specified in the mortgage deed, or, if no amount is therein specified, then shall not exceed two third parts of the amount that would be required, in case of total destruction, to restore the property insured.

(2) An insurance shall not, under the power conferred by this Act, be effected by a mortgagee in any of the following cases (namely):

(i) Where there is a declaration in the mortgage deed that no insurance is required;

(ii) Where an insurance is kept up by or on behalf of the mortgagor in accordance with the mortgage deed;

(iii) Where the mortgage deed contains no stipulation respecting insurance, and an insurance is kept up by or on behalf of the mortgagor, to the amount in which the mortgagee is by this Act authorized to insure.

(3) [*This sub-section relates to the application of the insurance money (l).*]

If a mortgage company through its manager undertakes with the mortgagor to keep alive an insurance on the mortgaged property, and takes steps towards carrying out such undertaking, but fails to carry it out, it is guilty of such negligence as to render it liable in damages to the mortgagor, if he is ignorant of such failure, for the amount of such insurance in case the property is burned after the policy lapses (*m*).

§373. Insurance in the name of the mortgagor.

Usually, when mortgaged property is insured, the insurance is effected in the name of the mortgagor, and a clause is inserted in the policy that the loss, if any, shall be payable

(l) Sub-s. 3 is similar in terms to s. 6 of the Mortgages Act, discussed in §376, *infra*.

(m) *Campbell v. Canadian Co-operative Investment Co.*, 1906, 16 M.R. 464, following *Skelton v. London and North Western Ry. Co.*, 1867, L.R. 2 C.P. 631, at p. 636.

to the mortgagee as his interest may appear. Under such a clause, it would seem that the mortgagee could give a good discharge for money paid to him only to the extent of his claim as mortgagee, and that as to any surplus the receipt of the mortgagor would be necessary, whereas if the words "as his interest may appear" are omitted, the mortgagee could give a good discharge as to the whole sum paid (*n*). In any case the mortgagee has an equitable lien upon the policy and its proceeds. (*o*)

Notwithstanding the insertion of the clause mentioned, the mortgagor is the person assured and may sue in his own name upon the policy (*p*). Furthermore, apart from a provision in the policy to the contrary (*q*), a subsequent breach by the mortgagor of any of the conditions of the policy, as, for instance, of a condition avoiding the policy in the event of the assignment of the property without the consent of the insurer, will avoid the policy as against both mortgagor and mortgagee (*r*).

Whether, in the case of a policy purporting to insure the mortgagor and containing a clause that the loss if any shall be payable to the mortgagee as his interest may appear, the mortgagee may sue in his own name without joining the mortgagor is a question which has been much discussed. The weight of authority in Ontario is in favour of the view that

(*n*) *Mitchell v. City of London Assurance Co.*, 1888, 15 O.A.R. 262, at p. 279.

(*o*) *Chew v. Traders Bank of Canada*, 1909, 19 O.L.R. 74.

(*p*) *Caldwell v. Stadacona Fire and Life Insurance Co.*, 1883, 11 Can. S.C.R. 212; cf. *McQueen v. Phoenix Mutual Fire Insurance Co.*, 1880, 4 Can. S.C.R. 660.

(*q*) As to the effect of a "mortgage clause" in a policy, see §374, *infra*.

(*r*) *Livingstone v. Western Assurance Co.*, 1868, 14 Gr. 461, 16 Gr. 9; *Chishom v. Provincial Insurance Co.*, 1869, 20 U.C.C.P. 11; *Mitchell v. City of London Assurance Co.*, 1888, 15 O.A.R. 262; *Haslem v. Equity Fire Insurance Co.*, 1904, 8 O.L.R. 246.

the mortgagee may maintain the action. As against the objection that the contract is between the insurer and the mortgagor and that the mortgagee, being a stranger to the contract, is not entitled to sue upon it, the clause in question being a mere direction and authority to the insurer to pay the mortgagee instead of the mortgagor (s), it has been held that the effect of the issue of the policy to the mortgagor with the loss, if any, payable to the mortgagee as his interest may appear, is to create the relation of trustee and *cestui que trust* between the mortgagor and the mortgagee. The subject of the trust is the right to receive the money payable under the policy and to sue for it, and this right may be exercised by the mortgagee in his capacity as *cestui que trust*, at least to the extent of his interest (t). In some of the cases where the policies were not under seal, emphasis was laid on this fact, but it would seem that the absence of a seal would not assist a third party in an action upon a contract to which he was not a party, and that the presence of a seal would not disentitle the third party from suing if the effect of the contract was to constitute him a *cestui que trust* (u).

(s) See *Mitchell v. City of London Assurance Co.*, 1888, 15 O.A.R. 262, at p. 274.

(t) *Mitchell v. City of London Assurance Co.*, 1888, 15 O.A.R. 262, where the earlier authorities are discussed; *Haslem v. Equity Fire Insurance Co.*, 1904, 8 O.L.R. 246; *Laidlaw v. Hartford Fire Insurance Co.*, 1916, 10 A.L.R. 7, 29 D.L.R. 229. As to the right of a *cestui que trust* to enforce a covenant made with his trustee, see also chapter 23, *Action on the Covenant*, §223.

(u) *Mitchell v. City of London Assurance Co.* was followed in *Agricultural Savings and Loan Co. v. Liverpool, etc., Insurance Co.*, 1901, 3 O.L.R. 127, reversed, without any decision as to the right of the mortgagee to sue in his own name, 33 Can. S.C.R. 94. It is pointed out in 3 O.L.R. at p. 136, that the policy though by deed was not a deed *inter partes* but a deed poll upon which anyone named in it might sue. In this case there was also a "mortgage clause," as to which, see §374, *infra*.

In a Nova Scotia case a policy not under seal contained the following provision: "Loss, if any, payable to the order of Peter Brush, if claimed within sixty days after proof, his interest therein being as mortgagee," and it appearing that the policy was obtained by the mortgagor in pursuance of a covenant entered into by him with Brush, that he should insure in the name and for the benefit of Brush, it was held that the mortgagee was entitled to sue on the policy in his own name (*v*).

In England it has been held that a covenant on the part of the mortgagor to insure, nothing being said as to the application of the insurance money, does not confer upon the mortgagee any right to the money in the event of the bankruptcy of the mortgagor (*w*), but in Ontario it has been held that a covenant to insure in the form provided by the Short Forms of Mortgages Act (*x*) operates as an equitable assignment of the insurance when effected (*y*). If there is neither a covenant to insure nor a provision that the money in case of loss shall be payable to the mortgagee, the mortgagee has no claim to money arising from insurance effected by the mortgagor (*z*).

Where an owner of property effects insurance thereon and subsequently mortgages the property, assigning the policy to the mortgagee, the insurance company cannot by arrangement with the mortgagee without the knowledge or consent of the mortgagor cancel the insurance. The mortgagor notwithstanding the assignment continues to be the person assured within the meaning of the Insurance Act, and the policy cannot be cancelled unless notice in writing is served upon

(*v*) *Brush v. Aetna Insurance Co.*, 1864, 1 Old. (N.S.) 459.

(*w*) *Lees v. Whiteley*, 1866, L.R. 2 Eq. 143.

(*x*) See §372, *supra*.

(*y*) *Greet v. Citizens Insurance Co.*, 1880, 5 O.A.R. 596, affirming 27 Gr. 121; *Goldie v. Bank of Hamilton*, 1900, 27 O.A.R. 619.

(*z*) *Miller v. Tew*, 1905, 20 O.L.R. 77, at pp. 90, 91.

the assured and the unearned portion of the premium is paid to him as required by the statute (*a*).

Where the mortgagor and the mortgagee effect separate insurances on their respective interests with different companies, and the mortgagee upon a loss occurring settles the amount of the loss with the company insuring him, this settlement even though the mortgagor may assent to it, does not constitute an estoppel against the mortgagor in favour of the other insurance company, and the mortgagor may nevertheless claim payment under his policy (*b*).

A statutory condition in Ontario provides that if the property insured is assigned without the written permission of the company the policy shall thereby become void. This, however, applies only to an assignment of the property and not to an assignment of the policy unaccompanied by a transfer of ownership of the property (*c*).

If a mortgaged property is insured in the name of the mortgagor, with loss, if any, payable to the mortgagee as his interest may appear, and a loss occurs, the surplus insurance money, after payment of the mortgagee's claim, belongs to the mortgagor by virtue of his contract with the insurer, and not by virtue of any obligation of the mortgagee to account in equity to the mortgagor. It follows therefore that the mortgagee is not entitled to invoke the doctrine of consolidation of mortgages so as to enable him to apply the surplus on account of an overdue mortgage held by him upon other property (*d*).

(*a*) *Morrow v. Lancashire Insurance Co.*, 1899, 26 O.A.R. 173.

(*b*) *Prittie v. Connecticut Fire Insurance Co.*, 1896, 23 O.A.R. 449.

(*c*) *McPhillips v. London Mutual Fire Ins. Co.*, 1896, 23 O.A.R. 524.

(*d*) *Re Union Assurance Co.*, 1893, 23 O.R. 627. See chapter 9, *Consolidation and Tacking*, §82.

§374. Mortgage clause in insurance policy.

In the case of insurance effected by a mortgagor upon mortgaged property it is now a common practice in Canada to insert in or attach to the policy a so-called "mortgage clause," safeguarding the mortgage against the danger of the policy being avoided by the act or neglect of the mortgagor, and conferring upon the insurer the right to be subrogated (c) to the rights and securities of the mortgagee in the event of the insurer claiming that the policy is avoided as against the mortgagor.

The form of mortgage clause adopted by The Canadian Fire Underwriters' Association is as follows:

Policy no. It is hereby provided and agreed that this insurance, as to the interest of the mortgagees only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy.

It is further provided and agreed that the mortgagees shall at once notify said company of non-occupation or vacancy for over thirty days, or of any change of ownership or increased hazard that shall come to their knowledge; and that every increase of hazard, not permitted by the policy to the mortgagor or owner, shall be paid by the mortgagees on reasonable demand from the date such hazard existed, according to the established scale of rates, for the use of such increased hazard during the continuance of this insurance.

It is also further provided and agreed that whenever the company shall pay the mortgagees any sum for loss under this policy, and shall claim that as to the mortgagor or owner no liability therefor existed, it shall at once be legally subrogated to all rights of the mortgagees under all the securities held as collateral to the mortgage debt, to the extent of such payment, or, at its option, the company may pay to the mortgagees the whole principal due or to grow due on the mortgage, with interest, and shall thereupon receive a full assignment and transfer of the mortgage, and all other securities held as collateral to the mortgage debt, but no such subrogation shall impair the rights of the mortgagees to recover the full amount of their claim.

(c) As to the right of subrogation, see also §375, *infra*.

It is also further provided and agreed that in the event of the said property being further insured with this or any other office, on behalf of the owner or mortgagees, the company, except such other insurance when made by the mortgagor or owner shall prove invalid, shall only be liable for a rateable proportion of any loss or damage sustained.

At the request of the assured, the loss, if any, under this policy is hereby made payable to — — as — — interest may appear, subject to the conditions of the above mortgage clause.

Mortgagees applied for a policy of insurance to be issued in the name of the mortgagor. The policy was so issued in the name of the mortgagor, loss, if any, payable to the mortgagees, and subject to a mortgage clause. The premiums were paid by the mortgagor. A fire occurred and the insurance company paid the mortgagees the amount of the policy. The mortgagor claimed to have the mortgage discharged as being satisfied by the insurance money; the insurance company claimed that the mortgagor for certain reasons had forfeited any claim under the policy, that notwithstanding that no liability existed on its part to the mortgagor it had paid the insurance money to the mortgagees upon the condition that it should be subrogated to the rights of the mortgagees as provided by the mortgage clause, and that it was entitled to an assignment of the mortgage. It was held that as the insurance company had failed to shew any good defence as against the mortgagor, it was not entitled to repayment of the money or to be subrogated to the rights of the mortgagee, and that the insurance effected by the mortgagee, was effected for the benefit of the mortgagor, the payment consequently enuring to the benefit of the latter (*f*). In other words, the insurance company's right to subrogation depends upon the validity of its defence as against the mortgagor.

(*f*) *Bull v. North British Canadian Investment Co.*, 1888, 15 O.A.R. 421, affirmed, 1889, 18 Can. S.C.R. 697, *Cameron, S. C. Cas. 1*. In the Supreme Court of Canada *Taschereau and Gwynne, JJ.*, expressed the opinion that the interest of the mortgagees was the same as if they were assignees of a policy effected with the mortgagor.

An insurer entitled to subrogation may recover from the assured not only the amount of any compensation or the value of any benefit received by the assured in excess of his actual loss, but also the full value of any rights or remedies against third persons which have been renounced by the assured and to which, but for such renunciation, the insurer would have been entitled to be subrogated (*g*).

The mortgage clause does not effect a new insurance in favour of the mortgagee. The insurer thereby agrees with the mortgagee that to the extent of the mortgagee's interest the insurance will not be invalidated by any future act or negligence of the mortgagor, but the insurer is not debarred from setting up that the insurance was procured by fraud and therefore void *ab initio* (*h*).

It has been said that the mortgage clause constitutes a contract between the insurance company and the mortgagee, and that consequently the mortgagee's right to sue upon the policy without joining the mortgagor does not rest solely upon the clause providing that the loss, if any, shall be payable to the mortgagee as his interest may appear (*i*). The case in which this opinion was expressed was reversed on appeal on the ground that in any event the mortgage clause did not protect the mortgagee against the consequence of misstatements made by the mortgagor in the application for the insurance. Such misstatements rendered the original insurance void, and a subsequent renewal by way of renewal receipt was likewise a nullity (*j*).

(*g*) *West of England Fire Insurance Co. v. Isaacs*, [1897] 1 Q.B. 226.

(*h*) *Omnium Securities Co. v. Canada Fire and Mutual Insurance Co.*, 1882, 1 O.R. 494.

(*i*) *Agricultural Savings and Loan Co. v. Liverpool, etc., Insurance Co.*, 1901, 3 O.L.R. 127, at p. 141. See §373, *supra*, as to effect of the last mentioned clause.

(*j*) *Liverpool and London and Globe Insurance Co. v. Agricultural, etc., Co.*, 1903, 33 Can. S.C.R. 94.

§375. *Insurance in the name of the mortgagee.*

A mortgagee, unpaid vendor or other person having a limited interest in property may effect insurance either (1) on his own interest merely, or (2) on his own interest as well as the interests of all other persons in the property. For instance, a mortgagee may effect insurance either (1) on his interest as mortgagee, or (2) on the property as a whole, including the equity of redemption. In order that the insurance effected by a mortgagee should cover the property as a whole (a) the mortgagee must have intended to insure the interest of the mortgagor as well as his own, and (b) the policy must not by its terms be limited to the mortgagee's interest in the property. *Primâ facie* the insurance is intended to cover the property as a whole, but the amount of the premium may make it clear that the risk is more limited. If only the mortgagee's interest is insured, the mortgagee is entitled to receive only the amount to which he is damaged, whereas if the property as a whole is insured, he is entitled to receive the whole amount of the damage to the property to the extent of the insurance, holding the surplus over and above his own loss for the mortgagor (k).

If a mortgagee insures the mortgaged property out of his own funds without having any right under the mortgage deed or otherwise to recover the premium from the mortgagor, the insurance is for the benefit of the mortgagee alone, and in the event of loss he is entitled to receive the amount of the policy without giving credit therefor upon the mortgage (l), that is,

(k) *Keefer v. Phoenix Insurance Co.*, 1901, 31 Can. S. C.R. 144, at pp. 148, 149, quoting from *Castellain v. Preston*, 1883, 11 Q.B.D. 380, at p. 398, and *Insurance Co. v. Updegraff*, 1853, 21 Penn. 513, at p. 520.

(l) *Russell v. Robertson*, 1859, 1 U.C. Chy. Ch. 72; *Dobson v. Land*, 1850, 8 Hare 216; *King v. State Mutual Fire Insurance Co.*, 1851, 61 Mass. 1.

he may hold the money as security for payment of the mortgage debt (*m*).

A contract of fire insurance, like a contract of marine insurance, is a contract of indemnity, and of indemnity only, and the assured, in case of a loss against which the policy has been made is entitled to be fully indemnified but is never entitled to be more than fully indemnified. One of the doctrines adopted in favour of the insurer in order to prevent the assured from recovering more than a full indemnity is the doctrine of subrogation. If an unpaid vendor or a mortgagee insures his interest in property and upon a loss occurring receives the mortgage money, and if he afterwards receives the purchase price or the mortgage money, as the case may be, without deduction on account of the insurance, he is liable to the insurer for an amount equal to the insurance money received by him, because he is not entitled to be more than fully indemnified (*n*).

So, if a mortgagee, after the occurrence of damage insured against, is paid by the mortgagor, the mortgagee is not entitled to recover from the insurer upon a policy covering his interest only, because he has not been damaged. If, on the other hand, the mortgagee obtains payment of the whole amount of the mortgage debt from the insurer, the insurer is entitled to be subrogated to the rights of the mortgagee and is entitled to a transfer of the mortgagee's securities (*o*). There can, however, be no right of subrogation unless the mortgagee's claim is wholly satisfied (*p*).

(*m*) See also §376, *infra*.

(*n*) *Castellain v. Preston*, 1883, 11 Q.B.D. 380, especially at pp. 386 ff.

(*o*) *Castellain v. Preston*, 1883, 11 Q.B.D. 380; *Smith v. Columbia Insurance Co.*, 1851, 17 Penn. 253; *King v. State Mutual Fire Insurance Co.*, 1851, 61 Mass. 1.

(*p*) *National Fire Insurance Co. v. McLaren*, 1886, 12 O.R. 682.

The case of two persons effecting, in different insurance companies, insurance of the same property in different rights has been stated thus (q) :

"Where different persons insure the same property in respect of different rights they may be divided into two classes. It may be that the interest of the two between them makes up the whole property, as in the case of a tenant for life and remainderman. Then if each insures, although they may use words apparently insuring the whole property, yet they would recover from their respective insurance companies the value of their own interests and of course those values added together would make up the value of the whole property. Therefore it would not be a case either of subrogation or contribution, because the loss would be divided between the two companies in proportion to the interests which the respective persons assured had in the property. But then there may be cases where, although two different persons insured in respect of different rights, each of them can recover the whole, as in the case of a mortgagor and mortgagee. But wherever that is the case it will necessarily follow that one of these two has a remedy over against the other, because the same property cannot in value belong at the same time to two different persons. Each of them may have an interest which entitles him to insure for the full value, because in certain events, for instance, if the other person became insolvent, it may be he would lose the full value of the property, and therefore would have in law an insurable interest; but yet it must be that if each recover the full value of the property from their respective offices with whom they insure, one office must have a remedy against the other. I think wherever that is the case the company which has insured the person who has the remedy over succeeds to his right of remedy over, and then it is a case of subrogation."

§376. *Application of insurance money.*

It is provided by the Mortgages Act, R.S.O. 1914, c. 112, s. 6, as follows:

6—(1) All money payable to a mortgagor on an insurance of the mortgaged property, including effects, whether affixed to the freehold or not, being or forming part thereof, shall, if the mortgagee so requires, be applied by a mortgagor in making good the loss or damage in respect of which the money is received.

(q) *North British and Mercantile Insurance Co. v. London, Liverpool and Globe Insurance Co.*, 1877, 5 Ch.D. 128 at pp. 153, 154 Mellish, L.J.

(2) Without prejudice to any obligation to the contrary imposed by law or by special contract a mortgagee may require that all money received on an insurance of the mortgaged property be applied in or towards the discharge of the money due under his mortgage.

This section was originally passed in 1886 (r), and was based on the English Conveyancing Act, 1881 (s).

Sub-s. 1 is practically declaratory of the mortgagee's right under the English statute, 14 G. 3, c. 78, now cited as the Fires Prevention (Metropolis) Act, 1774 (t), s. 83, formerly in force in Ontario (u). It gives the mortgagee the right, where insurance is effected by the mortgagor, even where there is no covenant on the part of the mortgagor to insure, or a covenant to insure merely but not to assign the policy, to require the money to be applied in making good the loss or damage (v).

Sub-s. 2 confers on the mortgagee a new right, namely, the right to "require that all money received on an insurance of the mortgaged property be applied in or towards the discharge of the money due under his mortgage." The words "without prejudice to any obligation to the contrary imposed by law" have probably lost their significance since the statute 14 G. 3, c. 78, s. 83, ceased to be in force. The words "special

(r) 49 V. c. 20.

(s) 44 & 45 Vict., c. 41. The clause in the English statute is found in connection with various special provisions as to the mortgagee's power to insure, which were substituted for Lord Cranworth's Act (1860), 23 & 24 V. c. 145. See §372, *supra*.

(t) See *In re Quicke's Trusts*, *Poltimore v. Quicke*, [1908] 1 Ch. 887; *Sinnott v. Bowden*, [1912] 2 Ch. 414.

(u) This statute, commonly referred to as the Metropolitan Building Act, was held to be in force in Ontario. *Stinson v. Pennoek*, 1868, 14 Gr. 604; *Carr v. Fire Assurance Association*, 1887, 14 O.R. 487. By the Ontario Insurance Act, 1887, 50 V. c. 26, s. 154, it was provided that the statute should not "be deemed to be in force with regard to property in this Province."

(v) *Edmonds v. Hamilton Provident and Loan Society*, 1891, 18 O.A.R. 347, at pp. 354-355.

contract" mean a special contract relating to the insurance (*w*). The sub-section presumably refers to insurance money received by the mortgagor, for no statutory provision was needed as to money received by the mortgagee (*x*).

The mortgagee is not at liberty without the consent of the mortgagor to accelerate the times of payment under the mortgage by applying the insurance money in payment of instalments of principal or interest not yet due, but he may apply it in payment of overdue instalments (*y*). On the other hand, subject to a provision in the mortgage to the contrary, he still has the right, which he had before the passing of the statute, to hold the money as he held the policy, as collateral or additional security for the mortgage debt, and he is not bound to apply it towards payment of either principal or interest overdue (*z*).

"Now the Act does not profess to interfere with any right the mortgagee had theretofore possessed to deal with the proceeds of the policy when the mortgage money was overdue. He was not compelled to apply it at all, or if he did apply it he might apply it in such a way as to preserve the full benefit of his contract. The new right or option which is given to him must, I think, be considered as one controlling any right which the mortgagor might otherwise have had to direct the disposition of the insurance received by or paid into the hands of the mortgagee before the mortgage debt becomes due. In effect the option given by the section is either to have the money applied in rebuilding or to have it at once applied in reducing the debt secured by the mortgage. If the latter option is not exercised the money remains in the mortgagee's hands (in those cases in which he has had, apart from the statute, the right to receive it) as it would have done before the

(*w*) 18 O.A.R. at p. 355.

(*x*) 18 O.A.R. at p. 368.

(*y*) *Corham v. Kingston*, 1889, 17 O.R. 432.

(*z*) *Edmonds v. Hamilton Provident and Loan Society*, 1891, 18 O.A.R. 347, reversing the judgment of the Queen's Bench Division on this point, 19 O.R. 677, and disapproving of *Corham v. Kingston*, 1889, 17 O.R. 432, in so far as it may be supposed to have decided that the mortgagee was bound to apply the insurance money on principal and interest as they matured.

Act, and subject to whatever rights or interests the parties by law respectively had therein, and *inter alia* to the right of the mortgagee to make such application of it as he might deem proper to the payment either of principal or of interest, or of both, overdue, or to make no application of it if he should deem it more advisable for the security of his contract not to adopt that course, but to require the mortgagor to make his payments in accordance with his covenants." (a)

If the mortgagee receives the insurance money before the time appointed for payment of the money secured by the mortgage he is entitled, nevertheless, to the interest without abatement (b).

"He may keep the insurance money by him, and sue for arrears, or distrain for them, if he has that power, or he may at his option apply the whole or part of the insurance money to the arrears. It is part of his security, and whenever there is default he may resort to it, or he may resort to his personal or other remedies. Of course as soon as the debt is reduced to an equality with the insurance money in his hands he must apply the latter *pro tanto* from time to time to subsequently maturing payments. It hardly needs to be added that a mortgagee retaining insurance money in his hands as security for future payments is accountable for any profit he makes with it, and that he ought not to leave it lying idle, but ought, if possible, to concur with the mortgagor in some profitable way of laying it out." (c)

In view of the definition of "mortgage" in the Mortgages Act as including "any charge on any property for securing money or money's worth" (d), it has been held that s. 6 of the statute is applicable to the case of insurance effected by a purchaser of land with loss, if any, payable to the vendors. Therefore, when the buildings on the land are destroyed by fire, the vendors are entitled to the security of the insurance money, just as before the fire they were entitled to the security

(a) *Edmonds v. Hamilton Provident and Loan Society*, 1891, 18 O.A.R. 347, at p. 357, Osler, J.A.

(b) 18 O.A.R. at p. 356; *Austin v. Story*, 1863, 10 Gr. 306.

(c) 18 O.A.R. at p. 367, MacLennan, J.A.

(d) R.S.O. 1914, c. 112, s. 2. See chapter 1, *Introductory*, §4, note (p).

of the buildings, but they are not entitled to apply the insurance money in payment of instalments of the purchase money not yet due (c).

Mortgaged property was insured in the name of the mortgagor with loss payable firstly to the first mortgagee and secondly to the second mortgagee as their interests might appear. The first mortgagee having received insurance money applied it on the first mortgage and subsequently sold the property under power of sale. It was held that the insurance money was properly applied, the effect being to reduce the first mortgage for the benefit of execution creditors intermediate between the two mortgages, and that there was no case for marshalling of two funds as between the two mortgagees (f).

Under a contract with the owner of a mill and machinery which was subject to three mortgages (the second and third in favour of the same mortgagees), each containing a covenant to insure, the plaintiffs took out the machinery, replacing it with new machinery, reserving a lien thereon for the balance of the price, the lien agreement providing that the mill-owner should insure the machinery for the plaintiffs' benefit. Before any further insurance was effected the mill and machinery were destroyed by fire. It was held upon the evidence, that the second mortgagees had consented to the purchase of the new machinery upon the terms specified, and, as a result of that finding, that the plaintiffs were entitled, subject to the first mortgagee's claim, to payment of the insurance money on the machinery and to be subrogated to the first mortgagee's rights against the land to the extent to which that insurance money was exhausted by him (g).

(c) *Scott v. Crinlan*, 1918, 43 O.L.R. 430, 44 D.L.R. 20.

(f) *Midland Loan and Savings Co. v. Genttl*, 1916, 36 O.L.R. 163, 30 D.L.R. 52.

(g) *Goldie v. Bank of Hamilton*, 1900, 27 O.A.R. 619.

CHAPTER XXXV.

THE SHORT FORMS OF MORTGAGES ACT.

§381. Short forms provided by statute, p. 731.

§382. Schedule A, p. 732.

§383. Schedule B, p. 733.

§384. Implied covenants, p. 738.

§381. *Short forms provided by statute.*

R.S O. 1914, c 117, provides as follows:

1. This Act may be cited as *The Short Forms of Mortgages Act*.

2. In this Act,

(a) "Land" shall include freehold tenements and hereditaments, whether corporeal or incorporeal, and any undivided part or share therein;

(b) "Party" and "Parties" shall include a body politic or corporate as well as an individual.

3.—(1) Where a mortgage of land, made according to the form set forth in Schedule A, or any other mortgage of land expressed to be made in pursuance of this Act, or referring thereto, contains any of the forms of words contained in Column One of Schedule B, and distinguished by any number therein, such mortgage shall have the same effect as if it contained the form of words in Column Two of Schedule B, distinguished by the same number as is annexed to form of words used in such mortgage; but it shall not be necessary any such mortgage to insert any such number.

2) Where a blank occurs in any of the forms in Column Two, form shall be read as if it were filled in with the words which fill the place of the blank in the corresponding form in Column One.

4.—(1) Parties who use any of the forms in the first column of Schedule B may substitute for the words "Mortgagor" or "Mortgagee," any name or other designation; and in every such case corresponding substitutions shall be taken to be made in the corresponding forms in the second column.

(2) Such parties may substitute the feminine gender for the masculine, or the plural number for the singular, in any of the forms in the first column; and corresponding changes shall be taken to be made in the corresponding forms in the second column.

(3) Such parties may introduce into or annex to any of the forms in the first column any express exceptions from or other express qualifications thereof respectively; and the like exceptions or qualifications shall be taken to be made from or in the corresponding forms in the second column (*a*).

5. Any such mortgage or part of such mortgage, which fails to take effect by virtue of this Act shall nevertheless be as effectual to bind the parties thereto, as if this Act had not been passed.

It is provided by the Land Titles Act, R.S.O. 1914, c. 126, s. 31, sub-s. 2, as follows:

31.--(2) Where a charge, whether or not under seal, is expressed to be made in pursuance of *The Short Forms of Mortgages Act*, or refers thereto, and contains any form of words contained in clauses numbered 1, 2, 3, 7, 8, 12, 14, 15 or 16 of Column One of Schedule B to that Act, whether expressed in the first or third person, such words shall have the same meaning and effect as the words under the corresponding number in Column Two in that schedule; and the provisions of that Act shall apply to the charge.

Provision is made by the Land Titles Acts in force in Saskatchewan, Alberta and the Northwest Territories for the use of short forms of covenants (*b*), but the language of the forms is frequently inappropriate to mortgages under the land titles system (*c*).

§382. *Schedule A.*

Schedule A to the Short Forms of Mortgages Act is as follows:

FORM OF MORTGAGE.

This Indenture, made the _____ day of _____, one thousand and nine hundred and _____, in pursuance of *The Short Forms of Mortgages Act*, between *(here insert the names of*

(*a*) As to the care which should be exercised in making changes in the short forms, see chapter 31, *Sale under Power of Sale*, §335. As to the operation of the statute, see also an article by A. E. O'Meara in 13 C.L.T. 25 (Feb., 1893).

(*b*) Sask. statutes, 1917 (2nd sess.), c. 18, s. 105; Alta. statutes, 1906, c. 24, s. 70; R.S.C. 1906, c. 110, s. 109.

(*c*) Thom, *The Canadian Torrens System*, p. 287.

parties and recitals, if any). Witnesseth, that in consideration of lawful money of Canada, now paid by the said mortgagee to the said mortgagor, the receipt whereof is hereby acknowledged, the said mortgagor doth grant and mortgage unto the said mortgagee, his heirs, executors, administrators and assigns for ever all (*parcels*).

(*Here insert provisions, covenants or other provisions.*)

In witness whereof the said parties hereto have hereunto set their hands and seals.

The original Act respecting Short Forms of Mortgages, 27 & 28 V. c. 31, passed in 1864, contained a provision as to what was included in a conveyance of land (*d*).

§383. *Schedule B.*

Schedule B. to the Short Forms of Mortgages Act is as follows:—

COLUMN ONE

COLUMN TWO

1. And the said wife of the said mort-out in chapter 18, *Dower and Curtesy in Mortgagor hereby bars her gaged Land, §176*.
dower in the said lands.

2. Provided this mortgage to be void out in chapter 19, *Discharge or Reconveyance, §181*.
on payment of

of lawful money of Canada, with interest at per cent., as follows: and taxes and performance of statute labour.

3. The said mortgagor covenants with himself, his heirs, executors and administrators, the said mortgagee, covenant, promise and agree to and with the said mortgagee, his heirs, executors, administrators and assigns, in manner following, that is to say:

(*d*) See now s. 15 of the Conveyancing and Law of Property Act, R.S.O. 1914, c. 109, quoted in chapter 1, *Introductory, §5*.

COLUMN ONE

COLUMN TWO

4. That the mortgagor will pay the mortgage money and interest, and observe the above proviso. [The corresponding extended form is set out in chapter 23, *Action on the Covenant*, §222].

5. That the mortgagor has a good title in fee simple to the said lands. 5. And also, that the said mortgagor, at the time of the sealing and delivery hereof, is, and stands solely, rightfully and lawfully seized of a good, sure, perfect, absolute and indefeasible estate of inheritance, in fee simple, of and in the lands, tenements, hereditaments and all and singular other the premises hereinbefore described, with their and every of their appurtenances and of and in every part and parcel thereof without any manner of trusts, reservations, limitations, provisos or conditions, except those contained in the original grant thereof from the Crown or any other matter or thing to alter, charge, change, encumber or defeat the same.

6. And that he has the right to convey the said lands to the said mortgagee. 6. And also, that the said mortgagor now hath in himself good right, full power and lawful and absolute authority to convey the said lands, tenements, hereditaments, and all and singular other the premises hereby conveyed or hereinbefore mentioned or intended so to be, with their and every of their appurtenances unto the said mortgagee, his heirs, executors, administrators and assigns, in manner aforesaid, and according to the true intent and meaning of these presents.

7. And that on default the mortgagee shall have quiet possession of the said lands. [The corresponding extended form is set out in chapter 22, *Action for Possession*, §214.].

8. Free from all encumbrances. [The corresponding extended form is set out in chapter 22, *Action for Possession*, §214.].

9. And that the said mortgagor will execute such further 9. And also, that from and after default shall happen to be made of or in the payment of the said sum of money in the said pro-

COLUMN ONE.

assurances of the said visio mentioned, or the interest thereof, or any lands as may be re- part of such money or interest or of or in quisite.

COLUMN TWO

the doing, observing, performing, fulfilling or keeping of some one or more of the provisions, agreements or stipulations in the said above proviso particularly set forth, contrary to the true intent and meaning of these presents and of the said proviso, then and in every such case the said mortgagor, his heirs, executors, administrators and assigns and all and every other person or persons whosoever having, or lawfully claiming, or who shall or may have or lawfully claim any estate, right, title, interest or trust of, in, to or out of the lands, tenements, hereditaments and premises hereby conveyed or mentioned or intended so to be, with the appurtenances or any part thereof, by, from, under or in trust for him the said mortgagor, his heirs, executors, administrators or assigns shall and will from time to time, and at all times thereafter, at the proper costs and charges of the said mortgagee, his heirs, executors, administrators, and assigns, make, do, suffer and execute, or cause or procure to be made, done, suffered and executed, all and every such further and other reasonable act or acts, deed or deeds, devices, conveyances, and assurances in the law for the further, better and more perfectly and absolutely conveying and assuring the said lands, tenements, hereditaments and premises, with the appurtenances, unto the said mortgagee, his heirs, executors, administrators and assigns as by the said mortgagee, his heirs, executors, administrators or assigns, or his or their counsel learned in the law shall or may be lawfully and reasonably devised, advised, or required, but so as no person who shall be required to make or execute such assurances shall be compelled, for the making or executing thereof, to go or travel from his usual place of abode.

COLUMN ONE

COLUMN TWO

10. And that the said mortgagor will produce the title deeds enumerated hereunder, and allow copies to be made at the expense of the mortgagee.

10. And also, that the said mortgagor, his heirs, executors, administrators, and assigns shall and will, unless prevented by fire or inevitable accident, from time to time, and at all times hereafter, at the request and proper costs and charges in the law of the said mortgagee, his heirs, executors, administrators, or assigns at any trial or hearing in any action or otherwise as occasion shall require, produce all, every or any deed, instrument or writing hereunder written for the manifestation, defence and support of the estate, title and possession of the said mortgagee, his heirs, executors, administrators and assigns, of, in, to or out of the said lands, tenements, hereditaments and premises hereby conveyed or mentioned or intended so to be, and at the like request, costs and charges shall and will make and deliver, or cause or procure to be made and delivered, unto the said mortgagee, his heirs, executors, administrators and assigns, true and attested or other copies or abstracts of the same deeds, instruments and writings respectively, or any of them, and shall and will permit and suffer such copies and abstracts to be examined and compared with the said original deeds by the said mortgagee, his heirs, executors, administrators and assigns

11. And that the said mortgagor has done no act to encumber the said lands.

11. And also that the said mortgagor hath not at any time heretofore made, done, committed, executed, or wilfully or knowingly suffered any act, deed, matter or thing whatsoever, whereby or by means whereof the said lands, tenements, hereditaments, and premises hereby conveyed or mentioned or intended so to be, or any part or parcel thereof, are, is or shall or may be in any wise impeached, charged, affected or encumbered in title, estate or otherwise howsoever.

12. And that the said mortgagor will insure the buildings on the said lands to

[The corresponding extended form is set out in chapter 34, *Fire Insurance*, §372].

COLUMN ONE

COLUMN TWO

the amount of not less
than
of lawful money of
Canada.

13. And the said mortgagor doth re-remised and for ever quitclaim, and by lease to the said mortgagee all his claims ever quit claim unto the said mortgagee, his heirs, executors, administrators and assigns, subject to the said proviso,

13. And the said mortgagor hath released, these presents doth release, remise, and for ever quit claim unto the said mortgagee, his heirs, executors, administrators and assigns, all and all manner of right, title, interest, claim and demand whatsoever, of, unto and out of the said lands, tenements, hereditaments, hereditaments and premises, subject mentioned, or intended so to be, and every part and parcel thereof, so as that neither the said mortgagor, his heirs, executors, administrators or assigns, shall or may at any time hereafter have, claim, pretend to, challenge or demand the said lands, tenements, hereditaments and premises, or any part thereof, in any manner howsoever, subject always to the said above proviso; but the said mortgagee, his heirs, executors, administrators or assigns, in respect of the said lands, tenements and premises hereby conveyed or as aforesaid, shall henceforth forever hereafter be exonerated and discharged of and from all claims and demands whatsoever which the said mortgagor, his heirs or assigns might or could have upon the said mortgagee, his heirs, executors, administrators or assigns, and the said lands, tenements, hereditaments, and premises, or upon the said lands, tenements, hereditaments and premises.

14. Provided that [The corresponding extended form is set out in chapter 31, *Sale under Power of Sale*, default of payment §334].

for
may on
notice enter
on and lease or sell
the said lands.

COLUMN ONE.

COLUMN TWO.

15. Provided that [The corresponding extended form is set the mortgagee may out in chapter 23, *Attornment and Distress*, distraint for arrears §361] of interest.

16. Provided that [The corresponding extended form is set in default of the pay-out in chapter 23, *Action on the Covenant*, ment of the interest §226] hereby secured the principal hereby secured shall become payable.

17. Provided that [The corresponding extended form is set until default of pay-out in chapter 22, *Action for Possession*, ment the mortgagor §214] shall have quiet possession of the said lands.

§384. *Implied covenants.*

It is provided by the Mortgages Act, R.S.O. 1914, c. 112, s. 7, as follows:

7. There shall, in the several cases in this section mentioned, be deemed to be included, and there shall in those several cases be implied, covenants to the effect in this section stated, by the person or by each person who conveys, as far as regards the subject-matter or share thereof expressed to be conveyed by him with the person, if one, to whom the conveyance is made, or with the persons jointly, if more than one, to whom the conveyance is made as joint tenants, or with each of the persons, if more than one, to whom the conveyance is made as tenants in common, that is to say:

(a) In a conveyance by way of mortgage the following covenants by the person who conveys, and is expressed to convey as beneficial owner, namely, covenants,

(i) For payment of the mortgage money and interest, and observance in other respects of the proviso in the mortgage;

(ii) For good title;

(iii) For right to convey

(iv) That, on default, the mortgagee shall have quiet possession of the land; free from all encumbrances;

(v) That the mortgagor will execute such further assurances of the said lands as may be requisite; and

(vi) That the mortgagor has done no act to encumber the land mortgaged;

according to the forms of covenants for such purposes set forth in Schedule B to *The Short Forms of Mortgage Act*, subject to the provisions of that Act.

(b) In a conveyance by way of mortgage of leasehold property, the following further covenants by the person who conveys and is expressed to convey, as beneficial owner, namely,

(i) That the lease or grant creating the term or estate for which the land is held is, at the time of conveyance, a good, valid and effectual lease or grant of the land conveyed, and is in full force, unforfeited, and unsurrendered, and in nowise become void, or voidable, and that all the rents reserved by, and all the covenants, conditions and agreements contained in the lease or grant and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed and performed, have been paid, observed and performed up to the time of conveyance; and also

(ii) That the person so conveying, or the persons deriving title under him, will at all times, as long as any money remains on the security of the conveyance, pay, observe and perform, or cause to be paid, observed and performed, all the rents reserved by, and all the covenants, conditions and agreements contained in the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him, to be paid, observed and performed, and will keep the person to whom the conveyance is made and those deriving title under him indemnified against all actions, proceedings, costs, charges, damages, claims and demands, if any, to be incurred or sustained by him or them by reason of the non-payment of such rent, or the non-observance or non-performance of such covenants, conditions and agreements, or any of them.

8. In a mortgage, where more persons than one are expressed to convey as mortgagors, or to join as covenantors, the implied covenants on their part shall be deemed to be joint and several covenants by them; and where there are more mortgagees than one, the implied covenant with them shall be deemed to be a covenant with them jointly unless the amount secured is expressed to be secured to them in shares or distinct sums; in which latter case the implied covenant with them shall be deemed to be a covenant with each severally in respect of the share or distinct sum secured to him.

It is also provided by the Conveyancing and Law of Property Act, R.S.O. 1914, c. 109, s. 22, sub-s. 1, clause (c), that in a conveyance by a person who conveys, and is expressed to convey, as mortgagee, there shall be implied a covenant on his part against encumbrances created by him.

It is provided by the Land Titles Act, R.S.O. 1914, c. 126 s. 31, sub-s. 1, and s. 32, as follows:

31.—(1) Where a registered charge is created there shall be implied on the part of the registered owner, at the time of the creation of the charge, his heirs, executors and administrators, unless there is an entry on the register negating the implication, covenants with the registered owner for the time being of the charge:

- (a) To pay the principal sum charged and interest, if any, thereon at the appointed time and rate; and all taxes, rates, charges, rents, statute labour or other impositions thereof or thereafter imposed or charged on the land, and that in case of default all payments made by the owner of the charge may be added to the principal sum and bear interest;
- (b) If the principal sum or any part thereof is unpaid at the appointed time to pay interest half yearly at the appointed rate on so much of the principal sum as for the time being remains unpaid.

32. Where a registered charge is created on any leasehold land there shall be implied on the part of the registered owner of such leasehold land, at the time of the creation of the charge, his heirs, executors, and administrators, unless there is an entry on the register negating the implication, covenants with the registered owner for the time being of the charge:

- (a) That the registered owner of such leasehold land, at the time of the creation of the charge, his executors, administrators or assigns will pay, perform and observe the rent, covenants and conditions by and in the registered lease reserved and contained, and on the part of the lessee to be paid, performed and observed; and
- (b) Will keep the owner of the charge, his executors, administrators and assigns indemnified against all actions, suits, expenses and claims on account of the non-payment of such rent, or any part thereof, or the breach of such covenants or conditions or any of them.

In Scotland, as in England, the Land Titles Act, 1917, s. 104, reads:

104. In every mortgage deed there shall be implied against the mortgagor certain covenants, namely, that he will repair and keep in repair the buildings and improvements erected or made upon the land, and that he will do so at all convenient times when the mortgage is in force, and that he will, with or without survey, maintain and repair the buildings or improvements.

Similar provisions are made in the North-

and the North-

(c) *Mortgage Act, 1917.*

c. 1 108.

CHAPTER XXXVI.

THE MORTGAGORS' AND PURCHASERS' RELIEF ACT.

- §391. Proceedings not to be taken without leave, p. 743
- §392. Excepted cases, p. 744.
- §393. Powers of the judge, p. 746.
- §394. Retroactive operation, p. 748.
- §395. Power to make rules, p. 749.
- §396. Lands situate or mortgage made without Ontario, p. 749.
- §397. Duration of the statute, p. 749.

§391. *Proceedings not to be taken without leave.*

5 George V, Chapter 22.

An Act to give further power to Courts with respect to the Recovery of Money secured by Mortgage and other similar matters.

Assented to 8th April, 1915.

HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. This Act may be cited as The Mortgagors' and Purchasers' Relief Act, 1915.

2.—(1) No person shall, —

(a) take or continue proceedings by way of foreclosure or sale or otherwise, or proceed to execution on or otherwise to the enforcement of, any judgment or order of any court, whether entered or made before or after the passing of this Act, for the recovery of principal money secured by any mortgage of land or any interest therein (a) made or executed prior to the fourth day of August, 1914;

(a) It has been said that the statute should be construed liberally, and the case of a derivative mortgage falls within its provisions. In the circumstances of a particular case proceedings upon a derivative mortgage were stayed on the application of the original mortgagees (the makers of the derivative mortgage). *Re Shepard and Rosevear and Moyes Chemical Co.*, 1918, 42 O.L.R. 184. On the other hand, see *Fisher v. Ross*, 1914, 24 M.R. 773, at p. 778, 19 D.L.R. 69, at p. 72, and *Chapman v. Purcell*, 1915, 25 M.R. 76, 22 D.L.R. 860.

- (b) take or continue any proceedings under any power of sale, or levy or distress, or take, resume or enter into possession of any land or interest therein for the recovery of principal money under any power contained in a mortgage of land, or of any interest therein, executed prior to the fourth day of August, 1914;
 - (c) declare or take advantage of the forfeiture of any land or of any right or interest acquired therein or of any sum of money paid for or on account of the purchase money of such land or of any interest therein, or by way of deposit or otherwise, under the terms of a contract for sale or purchase made or entered into prior to the fourth day of August, 1914;
 - (d) take or continue any proceedings for the recovery of any part of the principal money secured by mortgage or payable as part of the purchase money of any land or any interest therein payable by the purchaser or mortgagor upon any covenant or agreement as principal or guarantor or otherwise, whether express or implied, made or entered into prior to the fourth day of August, 1914, or enforce by execution or other process any judgment obtained in respect of any such covenant or agreement;
 - (e) take or continue proceedings for the rescission of, or for the recovery of damages for the breach of any contract involving the expenditure of money in providing improvements or services upon lands, or for the common benefit of the owners of lands laid out in building lots, upon the ground that default has been made in making such expenditure or in providing such improvements or services, when the date at which such expenditure should have been made or such improvements or services made or provided is later than the 4th day of August, 1914,
- except by leave of a judge granted upon application as hereinafter provided.
- (2) The application shall be upon originating notice in accordance with the practice of the Supreme Court and shall be made,—
- (a) in every case in which it is sought to commence or continue proceedings in the Supreme Court, in the County of York to a Judge of the Supreme Court sitting in Chambers, and in any other county or in a district to the local

where the opinion is expressed that the Manitoba statute of 1914, familiarly known as the Moratorium Act, should be construed strictly. In the annotation to the last mentioned case in 22 D.L.R. 865 ff., there is a useful note of some decisions under British and Manitoba moratory statutes

Judge of the Supreme Court sitting in Chambers or to a Judge of the Supreme Court sitting in Chambers;

- (b) in every case in which it is sought to exercise some right or remedy or take any proceeding or do any act out of court, in the County of York to a Judge of the Supreme Court sitting in Chambers, and in any other county or in a district to the local Judge of the Supreme Court, or to a Judge of the Supreme Court sitting in Chambers;
- (c) in every case in which it is sought to take or continue proceedings in a county, district or division court, to the judge of the proper county, district or division court.

3. —(1) Subject to the provisions hereinafter contained, no forfeiture of any interest acquired under a contract for the sale or purchase of land or any interest therein, given, made or entered into prior to the fourth day of August, 1914, shall take effect or be deemed to have taken effect since the fourth day of August, 1914, until after an order made by a judge as provided for in section 2.

(2) Subject to the provisions hereinafter contained no principal money secured or payable by any mortgage of or contract for purchase or sale of land, made or entered into prior to the 4th day of August, A.D. 1914 (or any extension or renewal thereof made or entered into after the 4th day of August, 1914) shall be deemed to be due or in default so as to affect or make inoperative any provisions therein for discharging, releasing or conveying any portion or portions of the land thereunder in accordance with the terms or provisions therefor in such mortgage or contract contained, the operation of such provisions being hereby extended so long as the payment of such principal is not enforceable under the provisions of this Act; provided, however, that should the vendor or mortgagee claim a readjustment of the amount to be paid for a discharge, release or conveyance of one or more portions in order to ensure sufficient security for the amount of principal remaining unpaid, upon failure to agree thereon such claim shall be settled by the Judge, (b).

§392. *Excepted cases.*

4. —(1) Subject to the provisions hereinafter contained, sections 2 and 3 shall not apply to any contract for sale or purchase or to any mortgage [made or entered into after the 4th day of August, 1914, or to any extension or renewal (c) made or entered into after

(b) Sub-s. 2 was added in 1918 by 8 G. 5, c. 26, s. 1.

(c) This section applies to the case of a mortgage which in form is a new mortgage made since the date mentioned, but which in substance and fact is a renewal or extension of a mortgage prior to that date. *Appelbe v. Windsor Security Co.*, 1917, 41 O.L.R. 217, 40 D.L.R. 256, s.c. 1918, 42 O.L.R. 16

the 4th day of August, 1914, of a mortgage made or entered into prior to that date where such extension or renewal is for not less than three years, and the rate of interest provided for in the original mortgage is not increased by such extension or renewal (*d*)], nor to the proceedings taken for the recovery of interest (*e*) (including arrears of interest which may under the terms of any such mortgage or extension or renewal have been or may be added to the principal money secured thereby) or rent or taxes or insurance or other disbursements for which the mortgagor was liable in the first instance, and as to which he is in default, nor to any proceedings or act done by a mortgagee in possession on the 4th day of August, 1914, with respect to the land or interest in land of which he is the mortgagee, nor to proceedings taken for the recovery of interest, taxes or insurance or other disbursements payable by the mortgagor in the first instance under a mortgage and paid or tendered on his default by the holder of a subsequent mortgage of the same lands.

(2) Nothing in this Act shall apply to or affect any right or remedy now exercisable for the enforcement of any mortgage or other security of a like nature made or entered into for the purpose of securing the bonds or debentures of any corporation, but the holders of any such bonds or debentures, any trustee for them, or the mortgagee named in any such mortgage as trustee or otherwise shall have and may exercise any such right or remedy whether the same is conferred by the general law or acquired under any such mortgage or other security as fully and effectually as if this Act had not been passed.

(3) Where default is made in payment of interest, rent, taxes, insurance or other disbursements which the mortgagor or purchaser has covenanted or undertaken to pay, the mortgagee or vendor, his assignee, or personal representative shall have the same remedies.

(*d*) The words within the square brackets were substituted in 1916 by the statute 6 G. 5, c. 27, s. 1, for the words "or extension or renewal thereof made or entered into after the fourth day of August, 1914." In other words, under the statute as amended, proceedings may be taken by a mortgagee without leave either upon a mortgage made after the 4th of August, 1914, or upon a mortgage made prior to that date which has been renewed or extended since that date for a period of three years or over at the old rate of interest or at a smaller rate.

(*e*) The onus of showing that claim is one of the excepted cases is upon the mortgagee. The exception as to interest applies only to interest contracted, in the ordinary manner, to be paid, that is, to the regular instalments of interest falling due at the periods mentioned in the mortgage, and does not apply to interest accruing *de die in diem* by reason of a special provision in the mortgage. *George v. Lang*, 1916, 36 O.J.R. 180, 30 D.L.R. 502.

and may exercise them to the same extent, and the consequences of such default shall in all respects be the same as if this Act had not been passed (*f*), but where such interest, rent, taxes or other disbursements are paid into court or tendered to the mortgagee, vendor, assignee or personal representative he shall not continue any proceedings already commenced by him without the order required by section 2 or by section 3, as the case may be, [except that in the case of the money being paid into court the plaintiff shall, if he so elects, have the right to take the money out of court and tax the costs of the proceedings as provided by the Consolidated Rules of Practice in an ordinary action; and in the case of the money being tendered the mortgagee or vendor or his assignee or personal representative shall be entitled to be paid costs of the proceedings already taken, the amount of such costs if not agreed upon to be taxed by the Taxing Officer of the Supreme Court in the county where the person taking the proceedings resides] (*g*)

§393. Powers of the judge.

5—(1) On any application the Judge may grant the leave applied for, or if he is of opinion that time should be given to the person liable to make any payment on the ground that he is unable immediately to make the same by reason of circumstances attributable directly or indirectly to the present war, the Judge may, in his absolute discretion, after considering all the circumstances of the case and the position of all the parties, by order refuse to permit the exercise of any right or remedy, or may stay execution or postpone any forfeiture or extend the time for the expenditure of any money or the making or providing any such improvements or services, as the case may be, for such time and subject to such conditions as he thinks fit (*h*).

(*f*) In case of default in payment of interest, rent, taxes, insurance or other disbursements which the mortgagor or purchaser has covenanted or undertaken to pay, the mortgagee or vendor is untrammelled by the statute, that is to say, he may pursue his remedies for the recovery of principal as well as interest and other charges, unless the mortgagor or purchaser pays or tenders the interest or other charges. *Toronto General Trusts Corporation v. Ritchie*, 1915, 8 O.W.N. 328; *Hind v. Gidlow*, 1915, 8 O.W.N. 327.

(*g*) The words enclosed within square brackets were added in 1918 by S.G. 5, c. 26, s. 2.

(*h*) No appeal lies from the order of a judge granting or refusing leave to proceed. *Re George and Lang*, 1916, 36 O.L.R. 382, 30 D.L.R. 504. If the mortgagee seeks to recover on the covenant against the mortgagor, and the latter is able to pay, the mortgagee should be permitted to proceed notwithstanding that the mortgagor

(a) Where the judge has made an order extending the time for the expenditure of money or for making or providing the improvements or services mentioned in clause e of subsection 1 of section 2, the order shall apply to any proceedings taken or sought to be taken by any other owner or purchaser of land in respect of any default in fulfilling the same contractual obligation with respect to other lands laid down upon the same plan or subdivision.

(2) The Judge may give directions as to the service of notice of the hearing of the application upon any person whom he deems a proper party to the proceedings, and may adjourn the hearing for that purpose, or he may dispense with service of the notice of the application upon any party who appears to have abandoned his interest in the property if the Judge considers that service of the notice would occasion useless or unnecessary expense or delay.

6. It shall not be necessary to support any such application by affidavit or other evidence, except such evidence, if any, as may be necessary to show the nature and extent of the relief required, but if any contest arises between the parties the judge to whom the application is made may make such requirements or give such directions as to evidence on the part of any party as the judge may deem proper.

7. The conditions upon which the order may be made may include the giving of any undertaking, or the deposit in court or otherwise of any security, or the appointment of a receiver or the granting of an injunction.

8. The costs of the application shall be in the discretion of the judge, who shall fix the amount of the same, and he may direct that they be added to the mortgage or other debt (1).

may not be entitled to leave to proceed against the purchaser of the equity of redemption. *Beswetherick v. Griesman*, 1915, 8 O.W.N. 139; cf. *Re Beswetherick and Greisman*, 1915, 8 O.W.N. 566. The fact that the mortgagor will be obliged to pay a higher rate of interest in order to pay off the mortgagee's claim is not sufficient ground for refusing leave to the mortgagee to proceed. *Re Central Canada Loan and Savings Co. and Yanover*, 1915, 8 O.W.N. 522. In particular circumstances it may be proper to put the mortgagor upon special terms, e.g., to require him to pay interest at an increased rate, and to pay over on account of principal the net revenue of the mortgaged premises, or the excess of the net revenue over the interest. *Re Hutson and Davidson*, 1918, 13 O.W.N. 475; cf. *In re Jobson's Application*, [1918] W.N. 14.

(1) It is usual for the judge to allow to the mortgagee his costs of the application, payable within a limited time. *Re Shepard and Rosevear and Moyes Chemical Co.*, 1918, 42 O.L.R. 184, at p. 187.

9. An order made under this Act may, if subsequent circumstances render it just to do so, be suspended or discharged or otherwise varied or altered upon application to a Judge or local Judge of the Supreme Court, or to the Judge of the proper County or District or Division Court as the case may be.

10. Where an action or other proceeding has been taken in court upon a mortgage or contract to which section 2 applies upon the trial of any issue arising in the action or proceeding, the judge, whether an application or order has or has not been made as provided by section 2, may exercise the discretion and make the order provided for by that section or by section 5.

11. The powers conferred by this Act shall be in addition to and not in derogation of any other powers of the court.

§394. *Retrospective operation.*

12.—(1) This Act shall take effect as from the fourth day of August, 1914, but where any proceeding has been taken or act done or any event has taken place since the fourth day of August, 1914, and prior to the passing of this Act, which it is declared by sections 2 and 3 shall not be taken or done or take place without the order of a judge, a Judge of the Supreme Court sitting in chambers, the local Judge of the Supreme Court, or the judge of the proper county or district or division court, as the case may be, upon application made as provided in section 2, and upon such terms and subject to such conditions as he may deem just, may confirm and validate such proceeding or act or declare that the event has taken place.

(2) An order made under subsection 1 may be registered in the proper registry or land titles office.

(3) Where in a land titles office any transfer has been registered on or after the fourth day of August, 1914, made under a power of sale contained in a mortgage or charge executed before that date, or where any transfer or vesting order carrying out the sale under the authority of an order or judgment of a court made for the purpose of enforcing such a mortgage or charge, has been so registered or where proceedings on a final order of foreclosure of such a mortgage or charge have been entered, the proper master of titles as soon as may be after the passing of this Act shall enter a note on the register of the lands prohibiting further dealings with the land transferred or in respect of which the foreclosure has been entered.

(4) The note shall refer to this Act and shall have the effect of preventing further dealings with the land until a confirmatory order has been obtained under subsection 1 and duly registered or such other proceedings have been taken as will confirm the title obtained or will revert the title in the owner of the equity of redemption.

§395. *Power to make rules.*

13. The powers of the Supreme Court to prescribe rules shall apply to the making of rules for carrying into effect the provisions of this Act and for regulating the practice and procedure under it where the same are not regulated by the existing rules.

§396. *Lands situate or mortgage made without Ontario.*

13a. The provisions of this Act shall apply to any actions or proceedings which are taken in any court in Ontario, notwithstanding that the lands in question in the action or proceeding are situate without Ontario, or the agreement or mortgage or other contract was made and entered into outside Ontario (j).

§397. *Duration of the statute.*

14. The Lieutenant-Governor in Council may at any time determine the operation of this Act or provide that this Act shall have effect subject to such limitations as may be contained in the Order in Council, but subject to the operation of such Order in Council this Act shall have effect during the continuance of the present war and for a period of nine months thereafter, unless in the meantime a Session of this Legislature is held, and in that case this Act shall cease to have effect at the expiration of thirty days from the close of such Session (k).

(j) This section was added in 1916 by the statute 6 G. 5, c. 27, s. 2. A court in Ontario will not restrain a mortgagee or vendor from taking proceedings in another province even though the land in question is situate in Ontario. *O'Connor v. Charleson*, 1916, 10 O.W.N. 35.

(k) In 1916 by the statute 6 G. 5, c. 27, s. 3, it was provided that "Notwithstanding anything contained in section 14 of *The Mortgagors' and Purchasers' Relief Act*, 1915, all the other provisions of the said Act shall continue in force and have effect until the expiration of thirty days from the close of the next session of the Legislature to be held hereafter." A further extension in similar terms was made in 1917 by the statute 7 G. 5, c. 27, s. 59, and in 1918 by 8 G. 5, c. 26, s. 3.

Index

- Absolute conveyance.
 - Evidence that it is a mortgage, 51
 - Circumstances showing intention, 52
 - Oral evidence admissible, 52
- Absence, *see* *Limitation of actions*
- Acceleration clause.
 - Short form of, 377
 - Special forms of, 381, 382
 - Relief from default, 378, 379, 380
 - Mortgagee not bound to avail himself of, 382
 - Mortgagee must accept if he claims all, 382
 - right to redeem arises, 491
 - Saskatchewan statute, 379
 - Manitoba statute, 379
 - Effect of clause,
 - as to consolidation, 140
 - in action on covenant, 379, 381
 - in foreclosure action, 380, 381
 - statutes of limitation, 543
 - power of sale, 651, 652
 - Stay of action on payment of arrears, 446
- Accord and satisfaction.
 - Part performance accepted in satisfaction, 502
 - Payment "in full," 502
- Account.
 - Mortgagor's right to, 573
 - Limitation of action for, 516
 - After sale under power of sale, 573
- Accounting between mortgagor and mortgagee.
 - Right of mortgagor to an account, 573
 - in redemption action, 511
 - in foreclosure action, 420
 - after sale by mortgagee, 573
 - Proceedings on taking accounts, 574

Accounting between mortgagor and mortgagee—*continued*

Items included in accounts, 575

amount of principal, 575, 576

taxes paid, 576

other items, 575, 576

Accounting by mortgagor in possession, 358, 577

Waste by mortgagor in possession, 577

See *Mortgagee in possession, Master's office, proceedings in, Interest, Costs*

Accretions.

Mortgagee entitled to, 20

Goodwill attached to premises, 20

Acknowledgment, see *Limitation of actions*Action, see *Account, Action on the covenant, Action for foreclosure or sale, Action for possession, Action for redemption, Limitation of actions,*

Action on the covenant.

Concurrent remedies of mortgagee, 349

Personal remedy against covenantor, 366

Mortgage implies obligation to pay, 367

Who may sue on the covenant, 372

personal representatives or trustee, 372

cestui que trust, 373

Who may be sued on the covenant, 373

trustee covenantor, 370

corporate covenantor, 370

mortgagor notwithstanding transfer, 373

transferee of equity not liable, 373

personal representative, 374

married woman, 374

infant, 24, 375

When the right to sue arises, 375

Acceleration of payment, 377

Amount recoverable, 368

Action under land titles system, 368

Short form of covenant, 369

striction of liability, 369

Principal and interest sued for separately, 370

dividing cause of action, 371

Action on the covenant—*continued*

Mortgagee entitled to deficiency, 383

after sale under power of sale, 383

after sale under decree, 464

In other cases mortgagee disentitled to sue,

if unable to reconvey, 384, 385

Mortgagee may sue after foreclosure, 385, 386, 454, 485

Right to sue may be barred or extinguished, 383

Stay of action on payment of arrears, 447

See *Equity of redemption, transfer of, Limitation of actions*

Action for foreclosure or sale,

Nature of foreclosure, 41, 388

Mortgagee usually entitled to foreclosure, 388

or sale at his option, 389

No foreclosure unless condition broken, 389

Sale only in case of mere charge, 390

In case of land without jurisdiction,

foreclosure but not sale, 391

No foreclosure against crown, 392

Foreclosure by chartered bank, 392

When right to foreclose arises, 393, 389

How right is lost, 393, 394

Writ of summons for foreclosure

combination of claims, 395

form of endorsement, 396

specially endorsed writ, 398

Plaintiffs in the action

all or both mortgagees, 399

trustees, 399, 400

personal representatives, 399, 400

partners, 400

married woman, 400, 401

assignee of mortgagee, 401

sheriff, under execution, 401

Original defendants,

persons interested in equity of redemption, 401, 405

except subsequent encumbrancers, 401

or by special direction of court, 402

Action for foreclosure or sale *con. Land***Original defendants** *continued*

- the mortgagor, 405
- purchaser of the equity, 407
- lessee of the mortgagor, 408
- personal representatives, 409, 410
- heirs at law, 409, 410
- wife or husband of mortgagor, 412
- surety for the mortgagor, 414
- prior mortgagee not a defendant, 403
 - unless relief sought, 404
 - or priority claimed, 404

Pleadings.

- general rules, 415
- altering or extending claim, 416
- what must be pleaded, 417

Interlocutory judgment, 418

- if infants interested, 419
- if all parties *sui juris*, 420
- insertion of special terms, 420, 421
- form of, without reference, 422
- form of, with reference, 424
- effect of, 424, 425

Stay of action on payment of arrears, 446**Change of state of account, 447****Final order of foreclosure, 448**

- how obtained, 450
- opening foreclosure, 451, 452
- enforcing covenant, 454

Action for sale, 455**Sale in foreclosure action, 456****Judgment for deficiency, 464****Foreclosure after abortive sale, 464****Sale and foreclosure under Land Titles Acts, 466**

- sale in registrar's office, 474
- foreclosure in registrar's office, 480
- opening foreclosure, 469, 474
- enforcing covenant, 485

Action for foreclosure or sale—continued

See *Master's office, proceedings in, Sale under judgment for sale, Limitation of actions, Sale and foreclosure under Land Titles Acts.*

Action for possession.

Concurrent remedies of mortgagee, 349

Possession as between mortgagor and mortgagee, 19, 350

In case of equitable mortgage, 350, 351

Enforcement of right to possession, 351, 352, 353

In case of subsequent mortgage, 352

Mortgagee's right apart from redemise, 19, 353

Proviso for quiet enjoyment till default, 355, 357

Covenant for quiet enjoyment after default, 356

Effect of attornment clause, 357

Rights of mortgagor in possession, 358

actions against third parties, 358

Rights of mortgagee against third parties, 360

against tenant of mortgagor, 249

Possession under Land Titles Acts, 360

In Ontario, 360, 361, 363

In Manitoba, 361-365

In Saskatchewan, 361-365

In Alberta, 363-365

In Northwest Territories, 365

See *Limitation of actions*

Action for redemption.

The right to redeem, 486

equity of redemption, 486

successive mortgages, 327, 328, 308

on equitable terms, 487

refusal of leave, 487

leases, 487, 488

Land outside jurisdiction, 489

When right to redeem arises, 490

not before maturity, 490

acceleration clause, 491

after five years, 491, 492

Interest or notice after default, 493

apart from statute, 493, 494

Action for redemption—continued

Interest or notice after default—*continued*

Ontario statute, 495

Alberta rule, 496

Reconveyance or discharge on payment, 496

Who may be plaintiffs, 503

interested in equity of redemption, 503

or sued for mortgage debt, 503, 506

assignee of equity, 504

subsequent mortgagee, 504

limited interests, 504, 505

tenant of mortgagor, 504

Who must be defendants, 506

person interested in equity if not plaintiff, 505, 506

mortgagee or representative, 506

purchasers from mortgagee, 507

subsequent mortgages, 507, 508

redeem up, foreclose down, 509

Writ of summons, 509

Interlocutory judgment, 510

Proceedings in master's office, 511

Foreclosure on default, 512

subsequent proceedings, 512

See Equity of redemption, Payment, Tender, Master's office, proceedings in, Limitation of actions.

Administration of estates.

Real property administered as personalty, 268

As between beneficiaries,

order of administration remains, 269

except as altered by statute, 269, 270

Change made by Locke King's Act, 269, 271

Mortgaged land primarily chargeable with mortgage debt, 271, 272

In other cases personalty primarily liable for debts, 271, 272

Order in which assets applied, 270

Estates of insolvent deceased persons, 273

Debts payable rateably, 273

Creditor holding security, 274

See Devolution of estates

- Administrator, see *Executors and administrators, Devolution of estates, Transmission under Land Titles Acts*
- Advances, see *Subsequent advances*
- Advertisement,
 Sale under judgment for sale, 460
 Sale under Land Titles Acts, 475, 482
 Sale under power of sale, 668
- Agent,
 Notice to, imputed to principal, 99, 100, 121
 Agent of mortgagee in possession, 488
 Power of attorney to sell land, 647
- Agreement
 To lend money, 80
 To borrow money, 80
 To give security, 75, 80
 See *Equitable mortgage*
- Ancient forms of mortgage, 1
- Antecedent debt, see *Consideration*
- Application,
 Of payments, 610
 in keeping down interest, 610
 by mortgagee in possession, 583, 596, 597
 Of proceeds of sale,
 after sale under power, 680
 after sale under judgment, 463
 under Land Titles Acts, 478
 Of insurance money, 726
- Arrears, see *Acceleration clause, Distress, Interest, Limitation of actions*
- Assignment,
 Chose in action, 94, 195
 Equitable assignment, 94, 196
 Subject to the equities, 198
 See *Assignment of mortgage, Leasehold mortgage, Equity of redemption, transfer of*
- Assignment of mortgage,
 Transfer of debt and land, 191
 Transfer of debt without land, 191, 192
 Transfer of land without debt, 192
 Form of assignment, 192, 194

Assignment of mortgage—continued

- Words sufficient to convey land, 193
- Assignment of mortgage debt, 194
- Notice to mortgagor not essential, 196
 - advisable to give notice, 197
- Payments by mortgagor without notice, 197
- Concurrence of mortgagor advisable, 198, 201
- Assignee takes subject to state of account, 198
- In case nothing advanced on mortgage, 198
- Effect of receipt in mortgage, 199
- Rents or interest in arrear, 201
- Assignee takes subject to set off, 201
 - and to existing equity, 201, 202
- Equity to set aside or reform mortgage, 202, 205
- Purchase without notice, 203, 204
- Liability of assignor to assignee, 206
- Assignor guaranteeing payment, 207
- Sub-mortgage or derivative mortgage, 207, 208
- Rights and powers of assignee, 208, 209
- Collateral securities, 209
- Land Titles Acts, 194, 200, 269
- See *Sale under power of sale, Distress*
- Assignment of mortgage, right to,
 - Reconveyance to person best entitled, 324, 328
 - Statutory right to assignment of mortgage, 326
 - reason for the statute, 326
 - if mortgagor entitled to redeem, 327
 - instead of reconveyance, 328
 - The amending statute, 328
 - rights of successive encumbrances, 329
 - Priorities unaffected by the statute, 330
 - right to keep mortgage alive, 330
 - second mortgage by mortgagor, 331
 - second mortgage by purchaser, 331
 - if purchaser assumed mortgage, 332
 - if purchaser did not assume mortgage, 333
 - On the same terms as reconveyance, 335
 - subject to rights of others, 335
 - partial owner of equity, 335
 - Mortgagee in possession, 336

- Assignment of mortgage, right to—*continued*
 - Mortgagee in possession—*continued*
 - not obliged to assign mortgage, 336, 589
 - but must reconvey, 336
- Assignments and Preferences Act, 12, 13, 14, 275.
- Assigns.
 - What powers may be exercised by, 208, 209
 - Sale under power of sale, 643, 644, 646
 - Distress, 696
- Attornment.
 - Tenancy created by attornment, 696, 697
 - Tenancy by estoppel, 698
 - Requisites of tenancy, 701, 702
 - Distress in case of attornment, 700
 - On what goods mortgagee may distrain, 705
 - What arrears may be recovered, 709
 - Attornment under Land Titles Acts, 710
 - Possession in case of attornment, 357
 - Form of attornment, 697, 698
 - See *Distress*
- Bar of dower, see *Dower*
- Bonus, see *Collateral advantage*
- Bracon, 2, 4
- Building loan, 124, 125
- Capacity.
 - To make legal mortgage, 24
 - Incapacity of infant, 24
 - Capacity of married woman, 25
- Cestui que trust*,
 - Against whom trust is enforceable, 28
 - Mortgage made by, 74
 - Third party suing on contract as, 373, 718
 - May compel trustee to lend name, 372
 - Statutes of limitation, 517, 524
- Chancery, Court of, see *Equity, Law and equity in Upper Canada*
- Charge, see *Equitable mortgage, Land Titles Acts*
- Chattel mortgage acts, 84
- Chattels, see *Fictitious, Property*
- Chose in action, assignment of, 195, 196

- Chose in action, assignment of, *continued*
 - Priorities between different assignees, 94
 - Subject to the equities, 198
- Clotting the equity of redemption, 45
- Coke on Littleton, 3, 36, 40
- Collateral advantage,
 - When stipulation for, is valid, 4
 - Bonus in addition to interest, 44
- Collateral security,
 - Effect of foreclosure on, 454, 455
 - Released by release of debt, 301
- Common law,
 - Mortgage at law, 3, 17, 58
 - Sources of law of mortgage, 5
 - Conveyance of legal estate, 17
 - Forfeiture on breach of condition, 18, 36, 38
 - Possession of land and title deeds, 19
 - Accretions and fixtures, 20
 - Capacity to make legal mortgage, 24
 - Incapacity of infant, 24
 - Capacity of married woman, 25
 - Capacity of trustee, 27, 30
 - Incapacity of *cestui qui trust*, 28
 - Power of personal representative, 29, 30
 - Power of devisee, 32
 - Legal mortgage in equity, 36
 - Valuable consideration, 33
 - See Law and equity in Upper Canada.*
- Compound interest, 611
- Concealment of encumbrance, 11
- Concealed fraud under Limitations Act, 545
- Concurrent proceedings,
 - Right of mortgagee to take, 349, 395
 - Not after notice of sale or demand, 662, 663
 - Nor by two separate actions, 396
- Condition, breach of condition,
 - Forfeiture at common law, 18
 - Relieved against in equity, 38
- Conditional sale, *see Fixtures*

- Conditions of sale.
 - Sale under judgment for sale, 461
 - Sale under power of sale, 671
 - Sale under Land Titles Acts, 475
- Conduct of sale.
 - Sale under judgment for sale, 460
 - Sale under power of sale, 665
 - Sale under Land Titles Acts, 475, 476
- Consideration.
 - Past consideration not sufficient, 33
 - Extension of time sufficient, 34
 - Forbearance to sue, 34
 - Doubtful right of action, 34
 - Absence of, as defence against assignee, 198
 - Under Registry Act, 112
 - Under Land Titles Acts, 155, 179, 180
 - See *Priorities*
- Consolidation.
 - Equitable doctrine of consolidation, 136
 - Simplest form of, 137
 - Not dependent on legal estate, 138
 - Mortgages must be overdue, 138
 - Default must be continuing, 139
 - Effect of transfer of the equities of redemption, 140
 - Mortgages must be by same mortgagor, 140
 - Effect of transfer of the mortgages, 140
 - Effect of acceleration clause, 140
 - Different mortgages to one mortgagee, 141
 - Against whom mortgagee may consolidate, 141
 - Mortgages to different mortgagees, 142
 - Effect of Registry Act, 145, 146
 - Effect of English Conveyancing Act, 145
 - Consolidation and tacking distinguished, 147
 - So-called tacking to avoid circuity of action, 149
- Constitutional Law, see *Legislative jurisdiction*
- Constructive notice, see *Notice*
- Conveyance
 - Use of the word "grant" 9
 - Words appropriate to create mortgage, 7, 9
 - Words of limitation, 9

Conveyance—*continued*

Conveyancing and Law of Property Act, 7

What conveyance of land includes, 10

Pursuant to power of sale, 676

See Legal mortgage

Conveyance with option to repurchase, 51

Where intended to be mortgage, 51

Extrinsic evidence admissible, 52

Conveyancing and Law of Property Act, 7

Costs.

General principles, 617

Negotiating and completing loan, 618

not part of mortgage debt, 618

common law debt of mortgagor, 618

Incurred in protecting security, 619

added to mortgage debt, 619

mortgagor not personally liable, 619

Mortgage action, 622

mortgagee entitled to costs, 622

unless guilty of misconduct, 623

effect of tender, 624

what costs include, 626

proceedings in master's office, 626, 435

subsequent encumbrancer, 627

Taxation of costs, 628

sale proceedings, 628

costs of solicitor-mortgagee, 628, 629

at instance of mortgagor, 629

Courts.

Concurrent remedies in different courts, 349

See Law and equity in Upper Canada

Covenant

Agreement for usual covenants, 80, 81

That security is good and valid, 206

Transferee of equity of redemption, 232

See Action on the covenant, Fire insurance, Implied covenants, Short Forms of Mortgages Act

Creditor

Under Statute of 11 Ed. fourth 11, 12

See Ejectment creditor

Under Statute of 11 Ed. fourth 11, 12

- Crops, see *Growing crops*
- Crown.
 - Foreclosure not ordered against, 392
 - Application of Limitations Act to, 538
- Curtsey, tenancy by the.
 - At common law, 295, 296
 - In equity of redemption, 296
 - Election under Devolution of Estates Act, 297
 - Abolished in western provinces, 296
- Death, see *Devolution of estates*
- Debenture, see *Floating charge*
- Debt.
 - Debt or loan implied, 367
 - See *Consideration, Interest, Limitation of actions*
- Default.
 - In payment, what constitutes, 376
 - See *Acceleration clause, Action on the covenant, Action for possession*
- Defeasance, proviso for.
 - Form of, 299
 - Effect of, 300
- Demand, mortgage payable on, 376
- Deposit.
 - In order to obtain judgment for sale, 457
 - By purchaser at time of sale.
 - under power of sale, 672
 - under judgment for sale, 460, 461
- Deposit of title deeds, 77
- Derivative mortgage.
 - Form of, 207, 208
 - Rights of mortgagee, 208
 - Reconveyance in case of, 302
 - Discharge in case of, 313
 - Parties to foreclosure action, 407
 - Mortgagors Relief Act, 742
- Devolution of estates.
 - Devolution of Estates Act 219, 268
 - Vesting of estate in beneficiaries, 222
 - Devolution of equity of redemption
 - Prior to Devolution of Estates Act, 266

Devolution of estates—*continued*Devolution of equity of redemption—*continued*

Since the statute, 268

Locke King's Act, 271

Estates of insolvent deceased persons, 273

Escheat of mortgagor's interest, 267

Devolution of mortgagee's estate

Mortgage security is personalty, 216

Foriner devolution of legal estate, 217

Power of executor or administrator, 217, 218, 221

Escheat of mortgagee's interest, 218

Devolution of Estates Act, 219

Payment if mortgagee dead, 222

*See Administration of estates, Executors and administrators, Transmission under Land Titles Acts*Disabilities, *see Limitation of actions*

Discharge or reconveyance,

Proviso for defeasance, 299

revesting of estate, 300

When reconveyance necessary, 300

in case of sub-mortgage, 302

Obligation of mortgage to reconvey, 301, 311

Who entitled to reconveyance, 301, 302, 324

contemporaneously with payment, 301, 496

at law and in equity, 302

Surrender of leasehold term, 303

History of legislation as to discharges, 308

Statutory form of discharge, 304, 306

Registration of discharge, 303, 304, 305

in case of equitable mortgage, 307

Effect of registration of discharge, 308

operates as reconveyance, 308, 309

reverts mortgagor's estate, 311, 312

Subrogation on payment, 128, 305, 312

Who may execute discharge, 308, 309

in case of sub-mortgage, 313

in case of mortgagee's death, 314, 315

Vesting order,

if mortgagee dead, 317

if mortgagee absent, 319, 320

Discharge or reconveyance—*continued*Vesting order—*continued*

sale subject to encumbrance, 318

Discharge under Land Titles Acts.

Manitoba, 321, 322

Saskatchewan, 321, 323

Alberta and N.W.T., 322, 323

if mortgagee absent, 322, 323

Ontario, 323

See *Assignment of mortgage, right to, Merger*

Distress.

No right of, unless stipulated for, 694

or under attornment clause, 694

License to distrain under short form, 695

Limited to goods of mortgagor, 705, 706

to goods not exempt from execution, 706

to one year's arrears as against creditors, 709

to six years' arrears *inter partes*, 710

Right to distrain under attornment clause, 700, 705

Arrears of interest after assignment, 696

Limitation of distress or action to recover land, 536, 546

Assignee of mortgage distraining, 696

See *Attornment*

Dower.

Dower in legal estate, 277

wife of mortgagee, 277

Owner of legal estate cannot defeat right, 278, 287

Requisites of dower, 279

When dower does not attach, 280, 295

Election under Devolution of Estates Act, 281

Dower in equity of redemption,

statute of 1834, 281

if husband dies beneficially entitled, 282

statute of 1879, 282

purchase subject to mortgage, 282, 283

mortgage of legal estate, 283, 284

quantum of dower, 286

Effect of bar of dower in mortgage, 284, 287

Modes of barring dower, 290, 291, 294, 295

Forfeiture of dower, 291

Dower *continued*

- In case wife a lunatic, 291, 292
- In case of absence for five years, 293
- Dower under English statute, 278
 - in British Columbia, 278
- Abolished in other western provinces, 278
 - mortgage of homestead, 278, 279

Basements.

- Included in conveyance of land, 10
- Effect of Registry Act as to, 113
- Under Land Titles Acts, 165, 166

Encumbrance.

- Statutory definition, 8
- In western provinces, 156, 157

Encumbrancer

- Ordinary meaning of, 8.
- In western provinces, 157

Encumbrancee, 157**Equal equities, 94**

- First in time prevails, 94
- The law prevails, 97

Equitable assignment, 94, 195, 196,

- Subject to the equities, 198

Equitable interest.

- Nature of equitable interest, 101, 54
- Against whom enforceable, 28, 53
- Unregistered equitable interests,
 - under Registry Act, 115
 - under Land Titles Acts, 173, 177
- Enforceable on equitable terms, 55
- When court will not enforce, 55
- Mortgage of, 74
- See *Priorities*

Equitable jurisdiction.

- See *Law and equity in Upper Canada*

Equitable mortgage.

- Definition, 71, 72
- How created, 72
- Under Land Titles Acts, 73, 78, 182

Equitable mortgage—continued

- Mortgage of equity of redemption, 73, 229
- Mortgage of other equitable interest, 74
- Instrument insufficient to convey legal estate, 75
- Defect of form, 75
- Agreement to give mortgage, 75
- Charge on land, 76
- Deposit of title deeds, 77
- Remedies of equitable mortgagee, 80, 686
- Foreclosure or sale, 80
- Right to possession, 350, 351
- Statute of Frauds, 72, 73, 77, 78
- Specific performance, 80
- Floating charge, 82
- Registration of equitable mortgage, 107, 119, 122
 - of discharge, 307
- See *Equitable interests, Registry Act, Land Titles Acts, Receiver*

Equity, legal mortgage in.

- Sources of law of mortgage, 5
- Mortgage regarded as security merely, 37
- Equitable right to redeem, 37
- Equitable right to foreclose, 40, 41
- Mortgage cannot be made irredeemable, 41
- Exception in case of family arrangement, 42
- Once a mortgage always a mortgage, 42
- Stipulation for collateral advantage, 43
- Effect of repeal of usury laws, 44
- Clogging the equity of redemption, 45
- Life insurance effected with mortgagee company, 49, 50
- Disguised forms of mortgage, 51
- Conveyance upon trust to sell, 51
- Conveyance in form of absolute conveyance, 51
- Conveyance with option to repurchase, 51
- Extrinsic evidence of intention, 52
- Bar of equity of redemption, 55
- Extinguishment of equity of redemption, 55
- Release of equity of redemption, 55, 56
- Nature of equity of redemption, 54



Equity, legal mortgage in, —*continued*

See *Law and equity in Upper Canada, Priorities, Equitable mortgages.*

Equity of redemption,

Nature of discussed, 54

Not strictly speaking an estate, 54

Not even an absolute right, 55, 487

Distinguished from contractual right, 45, 229

Contradicts language of mortgage, 38

Extinguishment of equity of redemption, 55, 56, 344

Consolidation of mortgages, 136

Laches, effect of, 487

See *Devolution of estates, Curtesy, tenancy by the, Dower, Transmission under Land Titles Acts, Limitation of actions, Execution creditors of mortgagor*

Equity of redemption, transfer of,

Mortgage of equity of redemption, 73, 229

Absolute transfer of, 230

Right to surplus after sale, 232

Assignment of incidental rights, 231

Right of transferee to rents, 231

Right to benefit of covenants, 232

Subject to state of account, 233

Mortgagor remains liable to mortgagee, 233

Transferee not liable to mortgagee, 233

unless indemnity assigned, 238, 240

liable in Alberta, 238

Liability if separate parcels sold, 243

Purchaser assuming mortgage, 332

Purchaser not assuming mortgage, 333

Consolidation against transferee of equity, 141, 142

See *Indemnity, mortgagor's right to, Marshalling, Assignment of mortgage, right to*

Escheat,

Mortgagee's interest, 218, 219

Mortgagor's interest, 267

Estoppel,

Tenancy by estoppel, 698

Mortgagor estopped as against assignee, 198

Estate by estoppel, 126

- Evidence, see *Oral evidence*
- Exchange, under power of sale, 670
- Execution creditor of mortgagee.
 - Rights of execution creditors, 211
 - Seizure of mortgage under execution, 211
 - Discharge by sheriff or bailiff, 214
- Execution creditor of mortgagor.
 - When lien attaches to land, 124
 - Priorities, rule as to, 124
 - under Registry Act, 124
 - under Land Titles Acts, 169
 - Rights of execution creditors, 259
 - When entitled to notice of sale, 260
 - Equity of redemption.
 - formerly could not be sold, 60, 61, 259
 - law changed by statute, 61, 259
 - after death of mortgagor, 259
 - in case of two mortgages, 260, 261
 - Seizure and sale of equity of redemption, 261
 - Equity must be sold as a whole, 262
 - Effect of seizure, sale and conveyance, 263
 - What title purchaser acquires, 264
 - Who may purchase, 264
 - Purchase by mortgagee, 264, 265
 - Receiver by way of equitable execution, 260
 - Mortgagee paying prior execution, 261
 - Subsequent encumbrancer, 260
 - Party in foreclosure action, 428
 - Limitation of action, 522, 523
- Executors and administrators.
 - Power to mortgage or sell, 29, 30
 - Execution of direction in will, 30
 - Devise charged with payment, 31
 - Mortgage by devisee, 32
 - Estate of mortgagee devolves upon, 221
 - Entitled to mortgage money, 216, 217
 - May sue on the covenant, 372
 - May sue for foreclosure or sale, 399, 400
 - May reconvey or discharge, 217, 315

Executors and administrators—*continued*

Foreign executor may discharge, 316
but not foreign administrator, 316

Estate of mortgagor devolves upon, 268

May be sued on the covenant, 374

Defendants in action for foreclosure or sale, 268, 409

See *Devolution of estates, Administration of estates,*
Transmission under Land Titles Acts

Exemptions, see *Distress*

Expenses, see *Accounting between mortgagor and mortgagee,*
Mortgagee in possession

Extinguishment of mortgage, see *Discharge or reconveyance,*
Merger

Falsification, 574, 575

Feoffment, 9

Final order of foreclosure, 448

Form and effect, 449

How obtained, 450

When refused, 451

Opening foreclosure, 451, 452, 453

Mortgagee may enforce covenant, 454

Fire insurance,

Insurable interest, 712

of mortgagor, 712

of mortgagee, 714

of vendor or partial owner, 714

Right or obligation to insure, 714

Short form of covenant, 714, 719

Statutory power of mortgagee, 715, 635

Insurance in name of mortgagor, 716

Mortgagor is the assured,

although loss payable to mortgagee, 717

or although policy assigned, 719

Effect of transfer of property, 713, 720

When mortgagee entitled to sue, 717, 718, 723

Mortgage clause in policy, 721

effect of, 723

Insurance in name of mortgagee, 724

if confined to his interest, 724

Insurance of partial interests, 726

Fire Insurance —continued

- Insurer's right of subrogation, 721, 722, 723, 725
- Insurance is contract of indemnity, 725
- Application of insurance money, 726
- Mechanics lien, 132

Fixtures.

- Chattels affixed to realty, 20
- Degree of annexation required, 21
- Evidence as to circumstances, 21
- Mortgagee entitled as against mortgagor, 21
- When mortgagor may remove, 22
- Mortgagee's rights as against owner, 22
- Vendor under hire-purchase agreement, 22
- Question of priorities, 22, 23
- Mortgagee as against chattel mortgagee, 23
- Conditional Sales Act, 24
- Between landlord and tenant, 22

Floating charge.

- Applicability of equitable doctrines to, 48
- Usually contained in debenture, 82
- Contrasted with specific charge, 82, 83
- Present equitable charge, 83
- When it becomes specific, 83
- When postponed to mortgage or other charge, 84
- When registration required, 84

Foreclosure.

- Nature of remedy, 41
- See *Action for foreclosure or sale, Master's office, proceedings in, Sale and foreclosure under Land Titles Acts*

Foreign executor or administrator, 316**Forfeiture.**

- Mortgagor's estate forfeited at law, 18, 36, 38
- Relief against, in equity, 37, 38

Forged instrument.

- Under Registry Act, 112, 127
- Under Land Titles Acts, 127, 156

Fraud.

- Must be pleaded, 417
- Effect of, on priorities, 94, 96

Fraud—*continued*

Effect of, under Land Titles Acts, 174, 175, 176

Concealment of encumbrance, 11

Concealed fraud under Limitations Act, 545

Frauds, Statute of,

Must be pleaded, 417

Equitable mortgages, 72, 73

Deposit of title deeds, 77, 78

See *Oral evidence*

Fraudulent and voluntary mortgages,

Statute 13 Elizabeth, 11, 12

Assignments and Preferences Act, 12, 13, 14

Statute 27 Elizabeth, 15, 16

Glanvil, 1, 4

Good faith, purchaser in, 94, 96, 97, 98.

Goodwill, when mortgagee entitled to, 20

Grant, 8, 9, 10

Growing crops,

When mortgagee entitled to, 583, 584

Guarantor, Guarantee, see *Surety*

Hire-purchase agreement,

Chattels annexed to realty, 22, 23

Implied covenants

In conveyance by way of mortgage, 738, 740

In mortgage of leasehold, 739

Under Land Titles Acts, 740

See *Indemnity, right of mortgagor to*

Improvements,

Under mistake of title, 587, 679, 577

When allowed to mortgagee, 585, 586, 587

Incumbrance, incumbrancer, incumbrancee, see *Encumbrance*,
etc.

Indemnity, mortgagor's right to.

Transferee's obligation to indemnify, 234

express or implied, 234

Implied obligation may be negatived,

by oral evidence, 235

if vendor not liable, 236, 240

Nature of obligation, 235, 236, 240

Liability of married woman, 236, 240

Indemnity, mortgagor's right to,—*continued*

In case of sale under execution, 237, 265

Statutes of western provinces, 237, 238

Transferee not liable to mortgagee, 238, 239

except in Alberta, 238

In case obligation assigned to mortgage,

mortgagee may sue, 240

but may be disentitled, 241

Obligation confined to indemnity, 240

No relation of suretyship, 242

Infant,

Incapacity to make mortgage, 24

covenant to pay, 375

Defendant in action for foreclosure or sale, 409, 410

judgment against, 419

Reservation of day to show cause, 419

Service of notice of sale on, 655, 656

Instalment,

Subsequent advances under mortgage, 122

See *Acceleration clause*

Insurance

Life policy issued by mortgagee to mortgagor, 49, 50

See *Fire Insurance*

Intention, see *Oral evidence, Merger***Interest,**

When interest is payable, 599

implied contract to pay, 599

Rate of interest till maturity, 600

Parties may agree on any rate, 600

with some exceptions, 600

Sinking fund plan or blended payments, 601

rate must be stated, 601

Rate if no rate agreed on, 602, 604

Rate of interest after maturity, 602

language must be unambiguous, 602

excess paid by mistake, 603, 604

Effect of obtaining judgment, 605

Increased rate after default, 606

relief against, 606

statutory provision, 607

Interest—continued

Increased rate after default—*continued*

new bargain valid, 608

Apportionment of interest, 608

Calculation of interest, 608, 609

from time of advance, 609

application of payments, 610

Compound interest, 611

Interest in lieu of notice, 612

after maturity, 493

after five years, 491, 492

Legislative jurisdiction, 613

See *Acceleration clause, Limitation of actions*

Interpretation clauses.

Mortgages Act, 7, 8

Conveyancing and Law of Property Act, 7, 8

Joint account, money advanced on, 224

Joint debtors or contractors,

Effect of absence of one, 518

Acknowledgment by one, 519, 549

Judgment, forms of.

For foreclosure with reference, 424

For foreclosure without reference, 422

For sale, 422, 424

For redemption, 510

Against married woman, 374, 422

Judgment creditors, see *Execution creditors*

Judicature Act, see *Law and equity in Upper Canada*

Jurisdiction,

Foreclosure or sale of land outside, 391

Redemption of land outside, 489

See *Legislative jurisdiction*

Laches and acquiescence,

Bar of right to foreclose, 394

to redeem, 487, 488

Landlord and tenant, see *Attornment, Distress, Leasehold mortgage, Lessee of mortgaged land, Fixtures*

Land.

Statutory definitions, 8, 85

What conveyance of, includes, 10

Land,—continued

Chattels affixed to realty, 20

Land Titles Acts,

Distinguished from Registry Act, 151, 152

Old system and new system, 152

Statutes of various provinces, 152

Deplorable diversity of legislation, 153

History of legislation, 467, 470

Registration of titles, 154

contrasted with registration of deeds, 154

Main object of land titles system, 155, 178

Effect of forged instrument, 156

Definition of mortgage, 156, 157

Forms of mortgage, 158, 159, 160

Forms must be followed, 161

Definition of encumbrance, 156, 157

Encumbrancer and encumbrancee, 157

Charge,

under British Columbia statute, 157

under Ontario statute, 157, 158

Seal not necessary, 158

Effect of absence of consideration, 155, 179, 180

Mortgage or charge,

does not transfer estate, 160, 161

operates as security merely, 160

not a legal mortgage, 160, 182

registered or statutory mortgage, 160, 161

Instrument effective upon registration, 162

The registered or statutory estate,

its priority, 162

not equivalent to legal estate, 163

Certificate of title,

in western provinces, 163, 164, 166

in Ontario, 164, 165

absolute or indefeasible title, 163

qualified and possessory titles, 163

Registration of transfer, 165, 166

Registration and priority of mortgages,

mode of registration, 167

effect of prior registration, 168

*Land Titles Acts—continued**Registration and priority of mortgages—continued*

registration as notice, 168

subsequent advances, 168

Executions and their priority, 169

Mechanics liens, 172, 173

Unregistered interests,

in western provinces, 173, 177

may be enforceable, 177, 178

in Ontario, 178, 179

Trusts, notice of,

not to be entered on register, 174

Notice of unregistered interest, 174

Fraud invalidates title, 174, 175, 176

Notice not necessarily fraudulent, 174

Doctrine of notice excluded, 175

Quære whether statute effective, 175

Notice as evidence of fraud, 176, 177

Relation between fraud and notice, 177

Equitable mortgages,

contrasted with registered mortgage, 182

may be created, 182, 73, 78

Caveats or cautions,

priorities preserved by, 183, 184, 185

Remedies of mortgagee,

generally, 185

classification of, 187

Action on the covenant, 368

Taking possession, 360-365

Title by possession, 568, 570

Limitation of actions, 569

Attornment and distress, 710

Discharge of mortgage, 321

Implied covenants, 740, 741

Short forms of covenants, 732

Assignment of mortgage, 194, 200, 209

Seizure of mortgage under execution, 214

See Transmission under Land Titles Acts, Sale and Foreclosure under Land Titles Acts

Law and equity in Upper Canada.

Common law in Upper Canada, 57

Law of mortgage, 58

Introduction of equitable jurisdiction, 61

Subsequent changes in the courts, 64

The Administration of Justice Act, 1873, 66, 349, 366, 395

The Ontario Judicature Act, 1881, 66, 349, 366, 395

The Law Reform Act, 1909, 69

Local courts of requests, 58

Local courts of common pleas, 58

Court of King's Bench, 58, 62, 64

Court of Chancery, 63, 65

Court of Common Pleas, 64

Court of Error and Appeal, 65

Court of Appeal, 66

Supreme Court of Judicature, 66

High Court of Justice, 66

Supreme Court of Ontario, 69

Lease.

Power of mortgagor to lease, 257

Power of mortgagee to lease, 257

Renewal of mortgaged lease, 91

Registration of leases, 109, 111

Under Land Titles Acts, 165, 166

See *Tessee of mortgaged land*

Leasehold mortgage.

Generally, 85

Assignment of unexpired term, 86

disadvantages of, 87, 89

reservation of last day or hour, 87, 88

Mortgage by sub-lease, 90

disadvantages of, 90

sublease with declaration of trust, 90

Renewal of mortgaged leasehold, 91

Short Forms of Mortgages Act, 85

Implied covenants, 86, 739

Reconveyance or surrender of term, 303

Legal estate.

Essential to legal mortgage, 17

Importance of legal estate, 100, 101, 162

Legal estate,—continued

- Distinguished from equitable interest, 101
- Purchase of, for value without notice, 101
- Subsequent receipt of notice, 103
- Subsequently getting in legal estate, 103
- Better right to call for, 103, 104
- Effect of Registry Act, 114, 125, 126
- Doctrine of tacking, 138, 147
- Effect of Land Titles Acts, 162, 163
- See *Priorities, Tacking*

Legal mortgage,

- Form of, stereotyped, 17
- Requisites of, 17
- Distinguished from equitable mortgage, 71
- See *Common law, Equity, legal mortgage in, Priorities, Legal estate, Land Titles Acts*

Legal tender, 500**Legislative jurisdiction,**

- Payment of mortgage after five years, 491, 492
- As to interest and mortgages, 613

Lessee of mortgaged land,

- Leases before and after mortgage, 249
 - importance of distinguishing, 249
- Mortgagee's rights if lease paramount,
 - becomes landlord, 250
 - not entitled to possession, 250
 - when entitled to rent, 250
 - what rent entitled to, 251, 252
 - redemise clause, 252
 - equitable mortgage, 253
- Mortgagee's rights if lease subsequent,
 - entitled to possession, 255
 - not entitled to rent, 255
 - when new tenancy implied, 256
- Transfer of equity of redemption, 231
- Satutory or contractual power to lease, 257
- Subsequent lessee entitled to redeem, 408
- Rights of equitable mortgagee, 686

Lien.

- Mortgagee paying taxes, 576
- Improvements under mistake of title, 577, 587, 679
- Lien notes, 107
- Informal equitable charge, 76
- See *Execution creditors*

Limitation of estate in conveyance, 8**Limitation, statute of, must be pleaded, 417**

- Laches or acquiescence, 488, 489

Limitation of actions for personal payment,

- Action on covenant, 515
- In case of mortgage after 1st July, 1894, 515
- Arrears of interest recoverable, 515, 516
- Action of debt, 516
- Action for account, 516
- If mortgagee trustee of surplus, 517
- Effect of disability or absence, 517
 - if plaintiff under disability, 517
 - if defendant absent, 517
 - in case of joint debtors, 518
- Acknowledgment or part payment, 518
 - necessity for writing, 518, 519
 - in case of joint debtors, 519
 - to whom, 520
 - by whom, 521

Limitation of actions to recover money out of land,

- What proceedings covered by statute, 522, 523

Limitation as to principal, 523

- when time begins to run, 524
- in case of express trust, 524

Acknowledgment or part payment, 522

- by whom, 525, 526
- to whom, 525
- time of, 527

Limitation as to arrears of interest, 527

- proceeds of sale, 528
- in foreclosure action, 529, 530
- in redemption action, 528
- if prior mortgagee in possession, 531

Limitations of actions to recover money out of land—*con.*

Acknowledgment.

effect as to arrears of interest, 531

time of, 532

Limitation of actions for possession, foreclosure or sale.

Limitation prior to 1833, 532

Mortgagee not barred if in possession, 532

Real Property Limitation Acts, 534

Action to recover land, 535

applies to foreclosure, 536

or action for sale, 536

What constitutes possession, 536, 537

waste or vacant land, 537

Action by the crown, 538

When the right is deemed to accrue, 539

if claimant dispossessed, 539

if claimant dies, 539, 542

in case of tenancy, 540

mortgagor not tenant at will, 541

if claimant reversioner, 541

or remainderman, 541

joint tenants, 542

tenants in common, 542

Time runs against mortgagee.

when he is entitled to possession, 543

although prior mortgagee in possession, 544

Concealed fraud, 545

Acknowledgment, 545

by whom, 546

to whom, 546

form of, 547

time of, 547

Part payment, 548

by whom, 548

payment of taxes, 550

Effect of bringing action, 550

action for possession, 551

action for foreclosure only, 551

Effect of disability of plaintiff, 553

- Limitation of actions for possession, foreclosure or sale—*con.*
 - Extinguishment of title, 555
 - effect of statute, 556
- Limitation of actions for redemption.
 - Limitation prior to 1833, 532
 - Mortgagor not barred if in possession, 532
 - Real Property Limitation Acts, 534
 - Limitation if mortgagee in possession, 557
 - No extension for disability, 559
 - Nature of possession of mortgagee, 561
 - must be as mortgagee, 561
 - not referable to other right, 561
 - trustee for sale, 562
 - what constitutes possession, 563
 - wild or vacant land, 564
 - payment of taxes, 564
 - Possession of part of lands, 564
 - Acknowledgment by mortgagee, 565
 - by and to whom, 566
 - what constitutes, 566
 - time of, 567
 - if several mortgagors, 567
 - if several mortgagees, 567, 568
- Limitation of actions under Land Titles Acts, 568
- Limitation of right of distress, see *Distress*
- Lis pendens, 122, 529
- Littleton, 3, 4, 36, 40
- Loan, when implied from mortgage, 367
- Locke King's Act, 269, 271
- Lunacy Act, provision for vesting order, 317
- Married woman.
 - Capacity to make legal mortgage, 25
 - Married Woman's Conveyances Act, 25
 - Married Women's Property Act, 25, 26
 - Bar of dower, execution by, 25
 - Discharge of mortgage by, 25
 - Contracts and separate property, 26
 - Suing and being sued, 26, 374, 400
 - Form of judgment against, 374, 422
 - Under Land Titles Act, 26, 27

Married woman—*continued*

Undue influence, 27

Mortgage to secure husband's debt, 27

Obligation to indemnify vendor of equity of redemption,
236, 240

Marshalling.

Statement of doctrine, 244

Subrogation, 245

Application to sale of equity of redemption.

if one parcel sold, 244, 245

if different parcels sold, 246

Master's office, proceedings in.

Judgment for foreclosure or sale, 424

Judgment for redemption, 509, 510

Powers of the master, 424, 425

General conduct of the reference, 425

Considering judgment and adding parties, 426

Subsequent encumbrances, 427

who are, 428

Acquiring interest *pendente lite*, 429

Notices to other parties, 430

Taking accounts and appointing day for redemption, 432

proof of claims, 433, 434

taxation of costs, 435, 626

settling priorities, 435

time and place for redemption, 436

successive periods, 436

Master's report, 439

meaning of, 439

confirmation of, 440

appeal from, 441

effect of confirmation, 441

Subsequent accounts, 442

new day for redemption, 442, 444

if encumbrancer redeems, 444, 445

amount to be paid, 443

Stay of action on payment of arrears, 446

effect of acceleration clause, 446

Change of state of account, 447

Final order of foreclosure, 448

Master's office, proceedings in—continued

Sale, who may require 457

Sale proceedings, 460

powers of master, 460, 461

advertisement, 460

conditions of sale, 460, 461

reserve bid, 460, 461

conduct of sale, 461

deposit by purchaser, 461, 462

payment of balance, 462

report on sale, 462, 463

application of proceeds, 463

Judgment for deficiency, 464

Foreclosure after abortive sale, 464

Proceedings in redemption action, 511

Maxims of equity.

He who seeks equity must do equity, 137, 147, 149, 487

He who seeks equity must come with clean hands, 487

Where the equities are equal, the first in time prevails, 94

Where the equities are equal, the law prevails, 97, 148

Mechanics liens.

Under Registry Act, 123, 130

Under Land Titles Acts, 169, 172, 173

Merger.

At law and in equity, 338

Prevalence of equitable rule, 338

Merger depends on intention, 339

unless owner personally liable, 339

Three tests of intention, 340

Stranger paying off mortgage, 340

Subrogation, 341

Intention expressly declared, 341

Conveyance to trustee not necessary, 341, 343

Deeds drawn under mistake, 341

Intention gathered from circumstances, 342

Presumption from consideration of benefit, 343

Mortgagee acquiring equity of redemption, 344

priority over subsequent mortgagees, 344

Tenant for life paying mortgage, 345

Notice of subsequent charges, 346

Merger,—continued

Merger of mortgage debt in judgment, 605, 704

See *Assignment of mortgage, right to*

Mortuary statutes, see *Mortgagors' and Purchasers' Relief Act*

Mortgage.

Modern definition of, 6

Statutory definitions, 7, 8

Ancient forms of mortgage, 1

Mort gage and *vif gage*, 1, 4

Welsh mortgage, 4

Mortgage security is personal estate, 37

Under Land Titles Acts,

definition of mortgage, 156, 157

form of mortgage, 158, 159, 160

importance of statutory form, 161

See *Assignment of mortgage, Equitable mortgage, Equity, legal mortgage in, Common law, Leasehold mortgage*

Mortgage action.

Combination of claims, 349

See *Account, Action on the covenant, Action for foreclosure or sale, Action for possession, Action for redemption, Limitation of actions*

Mortgagee, statutory definition, 8

See *Assignment of mortgage, Devolution of estates*

Mortgagee in possession.

What constitutes taking possession, 580

in character of mortgagee, 581

not as owner, 581

Attornment clause does not constitute possession, 700

Rights of mortgagee in possession, 582

powers of management, 582

right to rents and profits, 583

application of rents and profits, 583

growing crops, 583, 584

carrying on business, 584

Right to reimbursement for expenses, 584

improvements, 585, 586, 587

Mortgagee in possession.—continued

- Obligations of mortgagee, 588
 - prudent management, 588
 - employment of agent, 588
- Not obliged to assign mortgage, 336, 589
- Liability for occupation rent, 589
- Liability for rents and profits, 591
 - diligence required, 593
- Liability for waste or deterioration, 594
- Manner of taking accounts, 595
 - account with rests, 595, 596
 - account without rests, 596, 597
 - sale of part of land, 598

Mortgagor.

- Statutory definition, 8
- Personal liability on covenant, 366
 - in absence of covenant, 367
 - notwithstanding transfer of equity, 233, 373
- See *Equity of redemption, transfer of, Indemnity, mortgagor's right to, Devolution of estates.*

Mortgagors' and Purchasers' Relief Act.

- Proceedings not to be taken without leave, 742, 743
- Includes derivative mortgage, 742
- Expected cases, 744, 745
- Powers of the judge, 746
- Mortgagor may be put upon terms, 746, 747
- Costs of application for leave, 747
- Retroactive operation, 748
- Power to make rules, 749
- Land situate without Ontario, 749
- Mortgage made without Ontario, 749
- Action in another province, 749
- Duration of the statute, 749
- See the preface, p. vii

Mortuum vadium, 1, 4**Negligence, see Title deeds****Notice.**

- Equitable doctrine of, 97
- Actual notice, 98, 119
- Constructive notice, 98

Notice,—*continued*

Notice imputed to principal, 99, 100, 121

Notice under Registry Act, 110, 113, 117, 121

Notice under Land Titles Acts, 174-177

Doctrine of tacking, 148

Notice to mortgagor of assignment, 196

Assignee of mortgage without notice, 202, 203

See *Priorities, Sale under power of sale*Occupation rent, see *Mortgagee in possession*Opening foreclosure, see *Action for foreclosure or sale, Sale and foreclosure under Land Titles Acts*

Oral evidence,

That conveyance is really mortgage, 52

Of intention for or against merger, 343

Of terms and extent of security, 77

Of purpose of deposit of title deeds, 77, 78

To rebut implied indemnity, 235

Part payment, see *Limitation of actions, Accord and satisfaction*Parties, see *Action for possession, Action on the covenant, Action for redemption, Action for foreclosure or sale, Master's office, proceedings in*

Payment,

Place of payment, 377

What constitutes default, 376

Punctual payment, what is, 380, 381

To surviving mortgagee, 222

In case of joint account, 224

Subrogation of person paying, 128, 305, 312

Conditions of payment,

Delivery of discharge or reconveyance, 301, 496

Indemnity if mortgage lost, 302

To whom payment is good, 500, 501

Payment "in full," 502

Remittance by mail, 502

Mortgage to secure floating balance, 503

See *Limitation of actions, Accord and satisfaction, Acceleration clause, Tender*Personal property, see *Property*Personal representative, see *Devolution of estates, Executors and administrators*

Pleadings in mortgage action, 415

Possession,

Right as between mortgagor and mortgagee, 19, 350

Title by, as tenants in common, 10

Adverse possession

under Registry Act, 127

under Land Titles Acts, 568

See *Action for possession, Mortgagee in possession, Limitation of actions*

Power of sale, see *Sale under power of sale*

Principal and agent, see *Agent*

Principal and surety, see *Surety*

Priorities.

Equitable principles as to, 93

Between two equitable mortgages, 94

Between first legal and second equitable mortgage, 96

Between first equitable and second legal mortgage, 97

Equitable doctrine of notice, 97

Constructive notice, 98

First mortgagee may lose priority, 100

Purchase for value without notice, 101

Effect of getting in legal estate, 102, 103

Better right to legal estate, 104

Chattels annexed to realty, 22, 23

Failure to enquire for title deeds, 95, 97, 126

Negligence in custody of deeds, 96

Who entitled to reconveyance on payment, 324, 330

See *Registry Act, Land Titles Acts, Consolidation, Tacking, Subrogation*

Property,

Statutory definition, 8

Division into real and personal, 85

Chattel mortgages not discussed, 85

Leasehold is personalty, 85

But leasehold mortgage resembles mortgage of realty,
85, 94

Chattels affixed to realty, 20

Puffer, defined, 8

Purchaser.

Statutory definition, 8

Purchaser—continued

For value without notice, 11, 101, 148

Assignee of mortgage, 202, 203

Payment of purchase money not necessary, 203

See *Equity of redemption, transfer of, Indemnity, mortgagor's right to, Priorities, Sale under power of sale, Sale under judgment for sale*

Real property, see Property**Real Property Limitation Act,**

English statute adopted in Upper Canada, 62

See *Limitation of actions*

Receiver,

For equitable mortgagee, 686

in lieu of possession, 686

payment of rent, 687

When appointment should be made, 687

Judicature Act, 688

Power of court to appoint, 689

even for legal mortgagee, 689

Who may be appointed, 689

Manager of business, 690

Mortgagee's power to appoint, 690

Conveyancing Act, 1881, 690

under express power, 691

Liability for receiver, 692

Powers and liabilities of receiver, 692

Recitals,

In conveyance under power of sale, 677

In discharge of mortgage, 311, 312

Reconveyance, see *Discharge or reconveyance, Assignment of mortgage, right to*

Redemption,

See *Action for redemption, Action for foreclosure or sale, Sale under judgment for sale, Sale under power of sale, Limitation of actions, Common law, Equity, legal mortgage in, Equity of redemption, transfer of, Law and equity in Upper Canada*

Redemise,

See *Action for possession, Attornment*

- Registrar's office, proceedings in, see *Sale and foreclosure under Land Titles Acts*
- Registration, see *Registry Act, Land Titles Acts*
- Registry Act,
- Contrasted with Land Titles Acts, 151, 154, 162
 - What instruments may be registered, 106
 - Instruments affecting unpatented land, 107, 114
 - Affidavit of execution, 107
 - Security not purporting to convey land, 107
 - Manner of registration, 108
 - Mortgages not recorded in full, 108
 - Effect of not registering, 109
 - Actual notice of earlier instrument, 110
 - Constructive notice, in case of lease, 110
 - When lease must be registered, 109, 111
 - Unregistered instrument not void, 112
 - Easement expressed in instrument, 113
 - Implied legal right or interest, 113, 115
 - Effect of absence of consideration, 112, 146
 - Effect of registration as notice, 113
 - To whom registration is notice, 114
 - General intention of the statute, 116
 - When registration is complete, 117
 - Priority of registration, 117
 - exception in case of actual notice, 117
 - Unregistered equitable claims, 119
 - Registration of equitable mortgage, 107, 120
 - Equitable interest expressed in instrument, 115
 - Implied equitable interests, 115, 121, 122
 - Subsequent advances under prior mortgage,
 - without notice of other mortgage, 122
 - after notice of other mortgage, 122
 - after registration of other mortgage, 123
 - after registration of mechanics lien, 123
 - after writ of execution, 124
 - building loan, 124, 125
 - Effect of statute on priorities, 125
 - Effect of negligence, 126
 - Registration does not validate forgery, 127
 - Adverse possession, 127

Registry Act,—continued

English and Irish registry acts, 127, 128

Subrogation on payment of mortgage, 128, 305, 312

Mechanics liens,

registration of claim, 130

priority of registration, 130

priority over earlier mortgage, 131, 133

application of insurance money, 132

Consolidation of mortgages, 145

Doctrine of tacking, 147, 120

Registration of discharge, 303, 304, 305

effect of registration, 308

Quære whether statute must be pleaded, 418

Release,

Of equity of redemption, 55, 56

Of debt releases collateral security, 301

Renewal of lease, *see Leasehold mortgage*

Rent, *see Attornment, Leasehold mortgage, Limitation of actions*

Repairs,

Mortgagor not obliged to repair, 577, 578

Implied covenant, 741

See Mortgagee in possession

Report, *see Master's office, proceedings in*

Sale and foreclosure under Land Titles Acts,

Ontario, foreclosure or sale, 466

sale under power of sale, 683

Manitoba, no jurisdiction in court, 467, 469

proceedings in registrar's office, 467

N.W.T., court alone has jurisdiction, 471

Saskatchewan, court has jurisdiction, 471

alternative procedure in registrar's office, 471

Alberta, court has jurisdiction, 472

alternative procedure in registrar's office, 472

Foreclosure by the court, 473

Opening foreclosure, 474, 469

Sale in registrar's office, 474

default and notice, 474, 475

mode of sale, 475

when right of sale exists, 476

Sale and foreclosure under Land Titles Acts,—*continued***Sale in registrar's office,—*continued***

transfer to purchaser, 478
application of proceeds, 478
effect of transfer, 479

Foreclosure in registrar's office, 480

application for foreclosure, 480
service of notice, 480
advertisement, 482
order of foreclosure, 482
acceleration clause, 483
enforcing covenant, 485

Contractual power of sale, 683, 684**Sale under judgment for sale,**

Right to foreclosure or sale, 389, 390

Action for sale, 455

Sale in foreclosure action, 456, 457

Writ of summons for sale, 456

Plaintiffs in the action, 399

Original defendants, 401

Pleadings, 415

Interlocutory judgment, 459

form of, without reference, 422

form of, with reference, 424

Time for redemption, 459

Stay of action on payment of arrears, 446

Change of state of account, 447

Final order of sale, 459

Conduct of sale, 460

See *Action for foreclosure or sale, Master's office, proceedings in, Limitation of actions*

Sale under power of sale,

Origin of the power, 631

validity now settled, 632

usual term of mortgage, 633

Statutory implied power of sale, 633

Lord Cranworth's Act, 634

Conveyancing Act, 1881, 634

Mortgages Act, 634

Sale under power of sale,--continued**Contractual power of sale, 638**

various forms of, 638

suggested special form, 638

Statutory short form of power, 640

extended form, 640

Qualifications of short form, 642

to what extent permitted, 642, 643

rights of assignee, 643, 644

former sales validated, 645

Who may exercise the power, 646

not assignee, unless mentioned, 646

appointment of attorney, 647

administrator, 648

trustee, 648

survivor of two mortgagees, 649

first and second mortgagees, 649

When the power may be exercised, 649

governed by terms of power, 650

acceleration clause, 651, 652

Power of sale without notice, 653

validity recognized, 653

deed absolute in form, 653

trust for sale, 654

Form and service of notice, 654

contents of notice, 654

form of notice, 655

service of notice, 655-660

Registration of notice, 661**Concurrent proceedings by mortgagee, 662**

right of mortgagee, 349, 395

not after notice or demand, 663

nor by separate actions, 396

Statutes of limitation,

right to sell under power, 523, 652

arrears of interest, 528, 681

as to surplus, 517, 681

Conduct of the sale, 665

mortgagee not a trustee, 665

except as to surplus, 665

Sale under power of sale.—*continued***Conduct of the sale.**—*continued*

liable for wilful default, 666

or recklessness, 666

inadequacy of price, 666, 680

auction or private contract, 667

advertisement, 668, 669

sale of part of lands, 669

sale *en bloc*, 670

exchange of lands, 670

special conditions, 671

deposit, 672

sale on credit, 683

Who may purchase, 673

not the mortgagee, 673

nor his agent or trustee, 674

subsequent encumbrancer, 675

mortgagor, 675

Conveyance and its effect, 676

purchaser without notice, 678, 679

Application of proceeds, 680**Service.** see *Sale under power of sale, Action for foreclosure
or sale, Master's office, proceedings in***Settled Estates Act.** 32, 33**Short Forms of Mortgages Act.**

Effect of short forms, 731

Qualifications and exceptions permitted, 732

Alteration of short forms, 642, 643, 382

Form of mortgage, 732, 733

What conveyance of land includes, 10

Bar of dower, 290

Proviso for defeasance, 299

Covenant for payment, 369

Covenant for good title, 734

Covenant for right to convey, 734

Covenant for further assurance, 734, 735

Covenant for production of deeds, 736

That mortgagor has done no act to encumber, 736

Covenant for insurance, 714

Release subject to proviso, 737

- Short Forms of Mortgages Act,—*continued*
Power of sale, 640
License to distrain, 695
Acceleration clause, 377
Quiet possession until default, 355
Quiet possession after default, 257, 356
 free from all encumbrances, 356, 357
Statute not applicable to leaseholds, 85
Under Land Titles Acts, 732
Sources of law of mortgage, 5
Specific performance,
 Agreement to borrow or lend, 80
 Agreement to give security, 80
Statute of Frauds, see *Frauds, statute of*
Statutes of Limitations, see *Limitation of actions*
Stay of proceedings,
 In action for foreclosure or sale, 446
 Effect of acceleration clause, 446
Sub-lease, see *Leasehold mortgage*
Sub-mortgage, see *Derivative mortgage*
Subrogation,
 Under Registry Act, 128, 305
 On transfer of equity of redemption, 245
 sale of one of two parcels, 244, 245
 sale of parcels to different persons, 246
Stranger paying off mortgage, 340, 341
 In case of fire insurance, 721, 722, 723, 725
Subsequent advances under mortgage, 122, 131, 168
Subsequent encumbrancer,
 Right to reconveyance, 324, 325
 Costs of, 627
 See *Master's office, proceedings in*
Surcharge, 574, 575
Surety,
 Mortgage made as, 40
 Mortgage by wife to secure husband's debt, 27
 Right to redeem, 414, 415
 Party in foreclosure action, 414, 415
Assignor of mortgage, 207
 may be discharged, 207

Surety—*continued*

Transfer of equity of redemption,
mortgagor not a surety, 242, 386

Original and collateral liability, 243

Action on surety's covenant, 367

Discharge by giving of time, 375

When entitled to demand before action, 376

Surplus, see *Sale under judgment for sale, Sale under power of sale*

Tacking,

Doctrine of, in equity, 105, 147, 148

Depends on legal estate, 148

Depends on absence of notice, 148

Origin of doctrine, 137

Distinguished from consolidation, 147

Provision of Registry Act, 147, 120

So-called tacking to avoid circuitry of action, 149

Taxation of costs, 628

Taxes,

Lien for taxes paid by mortgagee, 576

Statutes of limitation, 550, 564

Tenancy, tenant,

Tenants in common, 10

Joint tenants, 10, 11

Overholding tenant, 353

Tenant at sufferance, 353

Tenant at will, 353

See *Attornment, Distress, Leasehold mortgage, Lessee of mortgaged land, Fixtures, Curtesy, tenancy by the*

Tender,

Requisites of, 497

by and to whom, 497

place of, 498

production of money, 498

under protest, 499

cheque not sufficient, 499

Must be unconditional, 499

but mortgagor entitled to discharge or reconveyance,
496, 499

Tender—continued

Effect of tender, 496, 499

Legal tender in Canada, 500

Terre tenant, 19

Timber,

Cutting by mortgagor in possession, 578

Cutting by mortgagee in possession, 595

Title deeds,

Legal mortgagee entitled to, 19

Mortgagor may inspect, 19

Deposit of title deeds, 77

Failure to enquire for, 95, 97, 126

Negligence in custody of, 96

Transfer, see *Assignment of mortgage, Equity of redemption, transfer of*Transmission, see *Devolution of estates*

Transmission under Land Titles Acts,

Land devolves on personal representative, 225

Personal representative registered as such,

in Ontario, 227, 228

in Manitoba, 225, 228

in Saskatchewan, 226, 227

not in Alberta, 226, 227

nor in Northwest Territories, 226, 227

Relation between personal representative,

and the beneficiaries, 227

and third parties, 227, 228

Trespass,

Action by mortgagor for, 358

Action by mortgagee for, 360

Trustee,

Suing and being sued, 399, 400

Power to mortgage, 27

Covenant by trustee to pay, 370

restriction of liability, 370

Mortgagee, when trustee of surplus, 681, 682

Mortgage not trustee except of surplus, 685

Obtaining renewal of lease, 92

Declaration of trust in sublease, 90

Cestui que trust may compel trustee to lend name, 372

Trustee,—*continued*

Statutes of limitation, 517, 524

See *Executors and administrators, Devolution of estates, Transmission under Land Titles Acts, Cestui que trust*

Undue influence, 27

Value, valuable consideration, see *Consideration**Vivum Vadium*, 1, 4

Voluntary mortgage,

Not protected under Registry Act, 109, 112

Whether protected under Land Titles Acts, 179, 180

Fraudulent and voluntary mortgages, 11

Waste,

By mortgagor in possession, 577

By mortgagee in possession, 594

Welsh mortgage, 4

Writ of summons,

Special endorsement, 398

In action for foreclosure, 395

In action for sale, 466

In action for redemption, 509